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ABSTRACT:

Works of the United States Government: Time to Consider Copyright Protection

Masters of Law Thesis by Major Bradley W. Mitchell

Accepted by the George Washington University School of Law, August 7, 2002

The United States federal government invests billions of dollars in research and development activities each year. Some of this research develops into inventions, which may be patented and licensed. This research -- and other federal activity -- also yields tangible results that would generally be protected by copyright. However, copyright protection is specifically and explicitly prohibited for "any work of the United States Government". Thus, the U.S. taxpayer benefits from patentable results, but entirely subsidizes works that could otherwise be licensed through copyright law.

This thesis proposes resolving this dichotomy in the treatment of resources, by allowing copyright protection in federal government works. This would bring federal policy in line with the practice of many states and all other countries, and provide manhy benefits -- including shepherding the taxpayers' investment, linking costs to those who benefit from government works, bringing transparency to government actions, and rewarding creative federal employees.

This paper examines the development of the federal prohibition, and compares it with the context of other federal intellectual property protection and the current policies of states and other nations. The paper then discusses the benefits of the current prohibition and the proposed protection. With that setting in place, the proposal is made and analyzed.

Works of the United States Government: Time to Consider Copyright Protection

by

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The Faculty of

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WORKS OF THE UNITED STATES GOVERNMENT: TIME TO CONSIDER COPYRIGHT PROTECTION

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I. The Current Prohibition: A Dichotomy in the Treatment of Resources

The United States federal government invests billions of dollars in research and development activities each year. Research is conducted directly by federal agencies, in federal laboratories, and with commercial partners. Federal dollars also support the majority of research conducted in universities.

Some of this federal research develops into inventions, which may be patented and licensed. Royalties from licensing can reward the inventive federal employee, supplement her agency's research budget, and lessen the taxpayer burden by contributing to the general treasury.

This research -- and other federal activity -- also yields tangible results that would generally be protected by copyright. Indeed, the federal government is the single largest producer and distributor of information in the United States; [1] much of the information is embodied in reports, studies, books, films, computer software, and other works.

Similar works are copyrighted by private individuals and companies each day.

However, copyright protection is specifically and explicitly prohibited for "any work of the United States Government".[2] This leaves the works unprotected and open to any interested party -- domestic taxpayer or foreign user -- for any purpose, including profitable uses. Thus, the U.S. taxpayer benefits from patentable results, but entirely subsidizes works that could otherwise be licensed through copyright law.

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[1] OMB Circular A-130, *Management of Federal Information Resources* (issued November 28, 2000) at § 7(a).

[2] 17 U.S.C. § 105 (2002).

The copyright prohibition applies only to the federal government. It does not reach works created by state governments. The majority of states currently protect their works through copyright law, then license those works for the benefit of their taxpayers.

This dichotomy in the treatment of resources is not only inconsistent within U.S. intellectual property laws. It is also inconsistent with the protection other countries give to their government works. Some nations protect all of their works; others exclude specific areas from protection, particularly national laws. The United States, though, is the only country to leave all of its federal government works unprotected by copyright law.

Certainly, the U.S. federal policy did not arise by accident. It developed as a response to several critical concerns. Citizens need to know the laws that govern their actions. In a broader sense, a democracy requires an informed citizenry. The current system also avoids any issue of political bias in the release of information. Several other concerns are more theoretical: that taxpayers "own" the information created by their government, that royalties might distract government from activities without potential revenue, and that the process of licensing would be inefficient.

The current policy, though, could be changed to still address those concerns while also gaining many benefits from protecting the federal government works. A system could shepherd the taxpayers' investment, linking costs to those who benefit from government works. Even if licensing fees were waived in specific cases, the system would clarify those subsidies to highlight the beneficiaries for political discussion. Transparency in other government actions would also occur, as ill-fitting "workarounds" could be replaced by direct licenses; similarly, cooperative research agreements with universities and commercial partners would be simpler and

surer. Royalties could also be carefully shared to reward federal employees, aid the budgets of government agencies, and generally reduce taxpayer funding of the federal government.

This paper presents a proposal to enable copyright protection for federal government works.

To provide a comprehensive setting for the proposed solution, this paper first traces the development of the current prohibition. The judicial opinions and statutory law leading to the prohibition highlight some of the policy concerns. Those concerns, though, are also separately explored in depth. The paper then explains the specific benefits gained by controlling government works. The copyright prohibition is then compared to the treatment of other federal government creations, as well as against how the various states and other nations treat their works.

Finally, the proposed solution is described and placed in context with the concerns and benefits. Built from proven components of other intellectual property laws, the proposed licensing system gains the benefits shared by states and other countries, while honoring the concerns of control over government works.

II. The Road to Here: Development of the Section 105 Prohibition

A. Overview

The prohibition on protection for federal works is stated in Section 105 of the United States Copyright Act:

> Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.[3]

While this particular language first appeared in the 1976 Copyright Act, the clear purpose did not simply spring to life at that time. Indeed, the current phrasing closely resembles the first prohibition of federal works contained in a copyright act, Section 8 of the 1909 Copyright Act:

> No copyright shall subsist in * * * any publication of the United States government, or any reprint in whole or in part thereof * * * .[4]

And that language tracks the purpose of the first statutory prohibition, found in the Printing Law of 1895.[5] That law established the Government Printing Office. Along with ensuring distribution to anyone seeking a publication[6] and among pages of mundane supervisory matters[7], the law mentions that the GPO will provide copies of its printing plates:

> *And provided further*, That no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.[8]

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[3] *Id.* This section carried through most of the text of its predecessor, Section 8 of the 1909 Copyright Act. The new language explicitly allowed assignment of a copyright to the United States Government. It also substituted the word "work" for "publication". This clarified much confusion by shifting the focus to the government as author, rather than the much more specific role of printer.

[4] 17 U.S.C. § 8 (1909).

[5] 28 Stat. 608 (1895). 53 Cong. Ch. 23, Sec. 52.

[6] *Id.* at Section 42: "The Public Printer shall furnish to all applicants * * * copies of such printing with ten per centum added." This language has been carried through with remarkable fidelity to the present day 44 U.S.C. § 505.

[7] As one example (of scores), "The Public Printer may employ two clerks of class four, at an annual salary of one thousand eight hundred dollars each . . . ." *Id.* at Section 48.

[8] *Id.* at Section 52.

B. Development through Case Law

This century-old framework of statutory prohibition first built on -- and now supports -- judicial decisions also prohibiting copyright in federal government works.

The Printing Law of 1895, for example, built on nearly a half-century of court decisions prohibiting copyright in statutes and judicial opinions. Public policy -- if not yet codified in statute -- required that citizens have access to the laws that determined their rights and responsibilities.

Copyright was deemed to run counter to this open access. *Wheaton v. Peters*,[9] which focused on the lack of required deposit of copies to secure copyright, stated in closing:

> It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.

This statement appears at the end of the opinion, and without any supporting justification.

The Supreme Court, though, took the opportunity to provide justification of the theory some fifty years later. In *Banks v. Manchester*, [10] the Court examined -- and found invalid under copyright law -- an example of the prevalent model of state case law publication at the time.

Ohio used a suite of statutes that provided for the appointment of a reporter and outlined general obligations,[11] stating that "[t]he reporter shall secure a copyright, for the use of the State, for each volume of the reports so published"[12] and that the Secretary of State would contract with

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[9] 33 U.S. (8 Pet.) 591, 668 (1834).

[10] 128 U.S. 244, 9 S. Ct. 36, 32 L. Ed. 425 (1888).

[11] Ohio Rev. Stat. §§ 426-435 (1879)

[12] *Id.* at § 436.

a private printer to publish and distribute copies of the volumes.[13] The State's copyright was central to the bargain. A key element of the statutory guidance was the assignment to the private printer of "the sole and exclusive right to publish such reports, so far as the State can confer the same". The statute clearly envisioned that the private printer would use the exclusive right to profit by selling the volumes to the public.

The controversy in the case arose when another private printer reprinted two opinions from the official volumes. The defendant did so without permission from the officially contracted private printer, who brought suit to enjoin any further reprinting.[14]

The Court found for the defendant, finding no copyright in the opinions:

> Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and head notes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*, 8 Pet. 591, that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute. [* * *] What a court, or a judge thereof, cannot confer on a reporter as the basis of a copyright in him, they cannot confer on any other person or on the State.[15]

This exposition of policy ties together three theories of copyright in government works.

One strand in the *Banks* cable questioned the very ability of states to secure copyright protection for their works. In addition to the reasoning in the last line of the passage quoted above, the opinion contains much discussion of the status of the several states under the

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[13] *Id.* at § 437.

[14] Banks v. Manchester, 128 U.S. 244, 249 (1888).

[15] *Id.* at 253

Copyright Act. While claiming to refrain from reaching a final decision on the issue, the Court concluded that the "State cannot properly be called a citizen of the United States or a resident therein, nor could it ever be in a condition to fall within the description in § 4952, or § 4954"[16] of the Revised Statutes of the United States, which defined authorship eligibility for copyright purposes.

This line of reasoning -- of questionable weight even in *Banks* -- failed to gain adherence. Before and after the *Banks* decision, the Copyright Office accepted registrations from states seeking federal protection for their works.[17]

And clearly today states can -- and do -- secure copyright protection in some of their works.[18] This continued protection was ratified by silence in the Copyright Act of 1976. The 1976 Act restructured much of the American copyright law, but left the protection of state works untouched (and also unmentioned even in the legislative history).[19]

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[16] *Id.*

[17] *See* Compendium II of Copyright Office Practices, Section 206.3 (directing Copyright Office employees to process registrations by states of their government works).

[18] The particular methods used by states are discussed at length *infra* in § III(B).

[19] State and local copyrights are determined by Section 105's exclusive focus on federal works. This active reliance on *expressio unius est exclusio alterius* is seen in commentary and judicial opinions, finding that the express mention of federal works excludes extending the prohibition to state and local government works. *See* William Patry, LATMAN'S THE COPYRIGHT LAW (6th ed. 1986), at 54 (commenting that "No mention of state or municipal copyright is made either in the 1976 Act or in the accompanying legislative reports. Works of state and municipal (as well as foreign) governments are thus outside the ambit of Section 105 and are copyrightable") *and see* National Conference of Bar Examiners v. Multistate Legal Studies, Inc., 495 F. Supp. 34 (N.D. Ill. 1980), *aff'd*, 692 F.2d 478 (7th Cir. 1982) (quite strongly rejecting defense that "state agencies do not have the statutory right to obtain copyrights" by finding that the government works prohibition "the opposite inference is required when only one specific governmental entity, the United States of America, is excluded from the protection of the Act").

The second strand of the *Bank's* cable focuses on the government actor as an agent of the people. The issue can be summed as having paid once for the effort of its agent, the public should not be forced to pay a second time for the work.

This theory has been an important factor in many later cases. With the states' right a settle issue, the controversy has centered upon federal government employees as authors.

In early cases, the theory was used to cleave federal employees' efforts into three roles: pure employee, pure private citizen, and a hybrid. This categorization of roles was explicitly announced by a federal district court in *Public Affairs Associates, Inc. v. Rickover*,[20] although it is visible in cases going back many years.

Works created in the "pure employee" role have been viewed as government works and denied copyright protection, while those created in later two roles have been protected as works of private citizens. The pure employee role imputes the prohibition on federal government copyrights to works created by some individuals. The ban on the employer applies to its employees as well. It is established firmly when the work was created by a federal employee, under government direction, on government time, and with government resources.

Typically, all four factors must be present to find the employee/employer relationship. Any missing factor generally leads to a finding of action in a hybrid role, while the lack of two or more strongly suggest that the person was acting as a private citizen.

This can be seen in a brief survey of cases. In *Blunt v. Patten*,[21] the federal government provided critical assistance to a map maker -- including the use of a U.S. Navy ship and crew. The map maker provided a copy of the finished product to the government, and the Navy

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[20] 117 F. Supp. 601, 604 (D.D.C. 1959).

[21] 3 F. Cas. 762 (No. 1579) (C.C.S.D.N.Y. 1828).

benefited from using it. But the map maker was not a government employee; that missing element trumped the government's assistance and benefit, and the map maker was allowed to enforce his copyright over an infringer.

The case of *Heine v. Appleton*[22] shifted that element -- and resulted in a finding that the author's efforts were a government work. The author was employed by the federal government to travel with Commodore Perry and make sketches of the expedition to Japan; the author agreed that his work would be the exclusive property of the government. The sketches were incorporated in Commodore Perry's report to Congress, which Congress then ordered distributed to the public. The author's certificate of copyright was held to have no effect, as the "sketches and drawings were made for the government, to be at their disposal; and congress, by ordering the report, which contained those sketches and drawings, to be published for the benefit of the public."[23]

A third case, *Public Affairs Associates, Inc. v. Rickover*,[24] involved speeches made by a government employee. The employee was Vice Admiral Hyman Rickover. As manager of naval reactors for the Atomic Energy Commission, he was responsible for the Shippingport Atomic Power Station. He gave a speech about the power station at a convention of the American Public Power Association. The plaintiff in the case wished to publish the speech and sought a declaratory judgment that the speech was a "publication of the United States Government" and therefore unable to be copyrighted.

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[22] 11 F. Cas. 1031.

[23] *Id.* at 1033.

[24] 117 F. Supp. 601 (D.D.C. 1959), *rev'd*, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962), *opinion on remand*, 268 F. Supp. 444 (D.D.C. 1967).

The court found for Admiral Rickover, holding that his speech was his own work as a private citizen and open to protection under the Copyright Act. The court's holding was based on evidence that -- while the subject matter was definitely within Admiral Rickover's responsibility -- his official duties did not include "giving speeches".[25]

The emphasis on the employee's role in these early cases has shifted in recent years. Federal regulations have increased the coverage of employees' "off-duty" actions, including many copyright-producing activities like writing.[26] The regulations reflect a sensitivity to the public trust inherent in government employment, and seek to avoid even the appearance of personal profit from public. The regulations shift the default out to cover more of the employee's activities and institute a rigorous review mechanism of employees' works. This presumption and procedure has been effective in resolving controversies over the particular role a federal employee inhabited while creating a work.

The government actor strand still has relevance, but with a different focus. Recent emphasis has centered on determining the role of federal government contractors. Rather than deciding if an employee's actions were outside of the government sphere, the analysis shifted to whether a contractor's actions brought them inside the government sphere. This still unsettled issue is best described by a quote from the House Report:

> There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a government agency commissions a work for its own use merely as an alternative

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[25] 268 F. Supp. at 450.

[26] Federal employees in the Executive Branch, for example, are prohibited from receiving compensation for teaching, speaking, or writing on their assigned subject matter. This prohibition reaches back to any matter assigned in the previous year. 5 CFR 2635.807 (a)(2)(i)(E)(1).

to having one of its own employees prepare the work, the right to secure a private copyright would be withheld.[27]

The third *Banks* strand -- free public access to the laws that enforce a citizen's rights and responsibilities -- is given a single sentence in the opinion, but has gained much more significance.

This strand has been the focus of recent cases involving privately written model building codes adopted as law. *Building Officials and Code Administrators International, Inc. v. Code Technology, Inc.* presented an interesting fact pattern at the edge of the issue.[28] Building Officials (BOCA), a private non-profit organization, created a model building code. BOCA copyrighted the code and licensed it to state and local governments to adopt it by reference or in whole. Massachusetts adopted the BOCA code with minor revisions as a state regulation. BOCA then published the revised regulation, distributing it as Commonwealth of Massachusetts State Building Code, 3rd Ed, with a sale price of $22 and a notice that much of the state regulation was based on copyrighted material. State officials referred building code users to the BOCA edition.[29]

A competing publisher created a book of Massachusetts building laws and included the regulation that was based on the copyrighted BOCA model code. BOCA brought suit, alleging infringement of its copyright.

The District Court agreed with the probability of copyright infringement, but the Court of Appeals overturned the decision. The appellate decision held that the adopted portions of the

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[27] Andrea Simon, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 Colum. L. Rev. 425, 427 (1984) (quoting from and analyzing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 60 (1976).)

[28] 628 F.2d 730 (1st Cir. 1980).

[29] *Id.* at 732.

BOCA model code lost copyright protection when they became Massachusetts law. It found that the building regulations had the effect of law, particularly carrying fines and imprisonment for violations. As law, the court found "[d]ue process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions."[30]

The *Building Officials* reasoning was cited with strong approval in the most recent decision to examine the issue. *Veeck v. Southern Building Code Congress International, Inc.*[31] -- decided in June 2002 -- involved a fact pattern quite similar to *Building Officials.* SBCCI developed the model building code adopted by several towns in Texas; the defendant, Veeck, copied the model building code as adopted by the towns and posted it on his internet web site for others to access. The district court granted summary judgment in favor of SBCCI, enjoining Veeck's copyright-infringing activity and awarding SBCCI monetary damages.[32] A divided panel of the court of appeals upheld SBCCI's copyright in its model building codes, rejecting Veeck's defenses to copyright infringement.[33]

Struck by the importance of the issues involved, the court of appeals elected to rehear the case en banc -- and found that SBCCI's model building codes lost copyright protection upon adoption into law. Its decision in favor of the defendant rested on several grounds. The main basis was *Building Officials*-type due process, with the public needing access to the law that governs its conduct.

The *Veeck* court also discussed an interesting novel theory raised by the defendant. It posited that adopting the model codes converted one the copyrightable expression into facts; the

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[30] *Id.* at 734.

[31] Veeck v. Southern Building Code Congress International, Inc., 293 F.3d 791 (5th Cir. 2002)

[32] 49 F. Supp. 2d 885 (E.D. Tex. 1999).

[33] 241 F.3d 398 (5th Cir. 2001).

conversion is critical, since facts are explicitly denied copyright protection. When the building code is still in model form, it is just one particular expression of many possible model building codes. Once adopted into law, though, it becomes the sole way to express the law -- no other expression can adequately capture the factual rules that must be followed by the public.

While adding to the discussion, the *Veeck* court left the law much as it was after *Building Officials*. SBCCI's copyright remained intact in the portions of its model code not adopted into law. And privately-developed works simply referenced by a law -- like a land use map or car-valuation guide -- do not lose their copyright by the reference.[34] Finally, the bulk of federal government works are not law, and are not subject to a *Veeck*-like analysis.

C. Development through Legislation

The early case law focus on judicial opinions also gained immense breadth with the Printing Law of 1895 and the 1909 Copyright Act. As quoted above, these statutes expanded the copyright prohibition to cover not just laws and judicial opinions but all publications of the federal government.

The expansion enacted in the Printing Law of 1895 started as a much narrower prohibition.[35] The Printing Law contained a provision for selling duplicate printing plates to private publishers.[36] Private publishers could then print and distribute copies; this operated to satisfy the public demand for documents if the government printing office could not.

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[34] *See infra* note 74.

[35] Brian R. Price, *Copyright in Government Publications: Historical Background, Judicial Interpretation, and Legislative Clarification*, 74 Military Law Review 19 (1976) (describing the development of the Printing Law of 1895).

[36] *See supra* notes 5-8 and accompanying text.

Congress was concerned, though, that a private publisher might try to claim a copyright in the duplicate printing plates they had purchased from the government. To foreclose this possibility, it inserted a prohibition on copyright in reprints made from the duplicate printing plates.[37] In the enacted law, this narrow prohibition was joined with a general prohibition denying copyright protection in all government publications.[38] This is seen in the law as passed:

> *And provided further*, That no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.[39]

The 1909 Copyright Act directly adopted the decade-old policy of the Printing Law of 1895. The passage of the 1909 Copyright Act was unusually hurried, and copyright in government works received no debate in Congress.[40]

The Copyright Act of 1976 carried forward the prohibition, relatively unchanged from the 1909 Copyright Act.[41] During the intervening time, though, Congress considered changing the prohibition -- in both directions. A decade after the 1909 Copyright Act, several bills were proposed that would have allowed the government to selectively copyright its works (and also selectively release such copyrights).[42] No action was taken on the bills.[43]

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[37] Price, *supra* note 35, at 28 (citing 25 Cong. Rec. 1765 (1893)).

[38] *Id.* (citing 25 Cong. Rec. 1766-67 (1893)).

[39] 28 Stat. 608 (1895). 53 Cong. Ch. 23, Sec. 52.

[40] Price, *supra* note 35, at 30 (noting that "Congress had apparently not anticipated that the Senate and House committees would both take favorable action on the bill.")

[41] *See supra* notes 4-5 and accompanying text.

[42] The Copyright Society of the U.S.A., 1 STUDIES ON COPYRIGHT 171, 179 (1964) (citing S. 3983, 65th Cong., 2d Sess (1918); S. 579, 66th Cong., 1st Sess. (1919); S. 637, 67th Cong., 1st Sess. (1921)).

[43] *Id.* (noting, too, that no impetus is known for the proposed change).

Proposed bills over the next few decades generally left the prohibition intact. One bill, though, proposed to tighten the prohibition by substituting "work" for "publication".[44] The change would have clearly extended the ban on copyright beyond printed works of the government -- the line drawn by courts. Judicial opinions had narrowly construed the term "publication", finding the government work copyright ban not raised by a mosaic wall mural[45] or a sculpture.[46] The proposed bill was not enacted, but the change was prescient; the substitution became law in the Copyright Act of 1976.[47]

In the early 1960s, the Library of Congress polled federal agencies on the government works prohibition.[48] Several agencies suggested a widening provision similar to the 1918 to 1921 proposed bills: federal agencies should be allowed to copyright works in exceptional cases.[49] The idea was included in a proposed bill in 1964, but was deleted after proving too controversial.[50]

In 1967, Congress considered another tightening provision. The efforts were directed at works commissioned by the federal government and completed by private entities. This would have clarified much confusion about the status of contracted works (although against the general

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[44] STUDIES ON COPYRIGHT, supra note 42 at 179 (citing S. 3043, 76th Cong., 3d Sess § 11 (1940)).

[45] Dielman v. White, 102 F. 892 (C.C.D. Mass. 1900).

[46] Sherr v. Universal Match Corp., 297 F.Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

[47] *See supra* note 3 and accompanying text.

[48] STUDIES ON COPYRIGHT, *supra* note 42 at 182.

[49] *Id.* at 183.

[50] LATMAN'S THE COPYRIGHT LAW, *supra* note 18 at 52.

trend allowing copyright). Suggested language would have left little doubt, denying copyright protection for any "product of activities or research financed in substantial part by funds received directly or indirectly from the United States Government".[51] The proposal was not made into law, but was considered again in the debates leading to the Copyright Act of 1976 -- where it lost favor to giving some choice to federal agencies.[52]

In the early 1990s, Congress considered a limited copyright for federal government computer programs. After favorable testimony from witnesses on the idea, a bill was introduced in the House to amend the Stevenson-Wydler Technology Innovation Act of 1980.[53] That Act -- discussed in more depth later in this paper -- enabled greater development of patents granted to federally-assisted research.[54] The House bill sought to extend the success in the patent context to cover software. The House bill was joined by an identical bill in the Senate, but neither became law.

This history shows that the current prohibition has deep roots. It has received occasional attention from Congress and the courts, but has essentially remained the same for over a century. The world has changed during that time, of course, shifting to place far more importance on intellectual property; the federal government has adapted well to the shift, creating significantly more copyright-worthy works than it did a century ago. The importance of the information age

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[51] *See* Simon, *supra* note 27, at n. 221 (quoting 113 Cong. Rec. 9002 (1967) and discussing similar proposed language).

[52] *See infra* note 237 and accompanying text.

[53] David S. Levitt, *Copyright Protection for United States Government Computer Programs*, 40 IDEA 225, 245 (2000) (describing the debate surrounding the proposed bill) *and see Legislation: New Bill Would Extend Copyright to Federally Produced* Software, 41 Pat. Trademark & Copyright J. (BNA) 265 (Jan. 24, 1991).

[54] *See infra* Section III(C).

is universal, so the current United States policy can be compared to the current policies of other jurisdictions.

III. Learning from Other Jurisdictions

The prohibition on federal government works is fairly unique. Other countries have different policies, but none as extreme as that of the United States. The U.S. policy also applies only to the federal government; most states protect their government works through copyright law. And the policy applies only to copyrights, with the federal government able -- and quite willing -- to patent the results of federal research.

A. Other Countries

Intellectual property laws are becoming harmonized across the world. This is driven by international trade, which benefits from streamlined regulation. Laws that are similar reduce trade inefficiencies. Buyers and sellers in different countries can focus on the business aspects of trade, rather than spend time learning to bridge discrepancies in various national laws.

National policies often seek to protect national markets. Harmonization reduces these affirmative barriers to trade by mutual agreement: opening one's home market to other countries is rewarded with open access to the markets of the other countries.

Different laws, though, can also create unintended arbitrage opportunities. If a country does not recognize copyright in a particular type of work, then its citizens will lose permanent benefits as foreign distributors avoid servicing that market and domestic creators will also focus their efforts on other, protected, endeavors.[55]

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[55] Note, though, that the rogue nation's citizens may fleetingly benefit from lower prices, as the good can be sold without paying royalties to its creator.

Many nations have recently harmonized their laws to cover a less blatant "loophole": the duration of copyright protection. In 1993, the European Union issued a directive extending protection moving to the life of the author plus seventy years.[56] Many nations had different copyright terms, typically life plus fifty years.[57] Many of these nations quickly lengthened their terms to the new "life plus seventy" standard, fearing that their creators would lose two decades of profitable protection.

The "loophole" and loss of protection would occur through a common provision used in the EU directive. For foreign works, Article 7, Clause 1, stated that member nations would only recognize the shorter of the new "life plus seventy years" or the duration given by the nation of the foreign work. So, copyright owners in a country with a lesser term -- like "life plus 50 years" -- would lose the extended years of protection. The United States has harmonized the basic duration of its copyright protection to the "life plus seventy years" term.[58]

The United States prohibition on federal government works provides a unique arbitrage opportunity. Appendix A presents a fairly comprehensive survey of the policies of other countries. A brief summary here, though, shows that the United States is alone in the extreme scope of it prohibition.

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[56] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

[57] The term of "life plus fifty years" gained wide acceptance when the 1908 Berlin revision made it the basic term of protection in the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. 99-27, 99th Cong. 2d Sess. 37 (1986), 828 U.N.T.S. 221 (last revised at Paris, July 24, 1971) [hereinafter Berne Convention]. (the oldest copyright treaty in the world, established in 1886 to harmonize copyright laws across nations).

[58] 17 U.S.C. § 302 (2002), as amended by the Sonny Bono Copyright Term Extension Act of Oct. 27, 1998, Pub. L. No. 298, 105th Cong., 2d Sess., 112 Stat. 2827.

The positions of the United States and the other nations, while disparate, are all proper under international treaties. The primary international treaty on copyright law -- the Berne Convention for the Protection of Literary and Artistic Works[59] -- harmonizes many aspects of copyright law. The Berne Convention sets out many standards for signatories, so that basic protections are guaranteed across member nations. The protection of government works,[60] though, is one of the few areas explicitly left to individual nations to decide in their own best interests.[61]

This *laissez faire* approach is carried through in the other major source of international guidance. The growing economic importance of copyright works (among other interests) prompted the introduction of intellectual property into General Agreement on Tariffs And Trade (GATT) negotiations. The negotiations resulted in the Agreement on Trade-Related Aspects of Intellectual Property Rights, commonly called TRIPS.[62] TRIPS explicitly incorporates nearly all of the Berne Convention, including the latitude given to individual countries to decide the level

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[59] *See supra* note 57.

[60] The Berne Convention speaks specifically in terms of legal texts, raising the interesting possibility that other government works must be protected under the other encompassing definitions of subject matter that must be extended copyright protection under the Convention. Berne Convention, art. 2, cl. 4, quoted *infra* note 61.

[61] Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, 1971, art. 2, cl. 4, states that: "It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts."

[62] TRIPS: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, GATT Doc. MTN/FA II-A1C (Dec. 15, 1993), reprinted in 33 I.L.M. 81 (1994) (hereinafter TRIPS).

of protection to afford government works;[63] no other portion of TRIPS countermands that authority.

The summary of national policies in Table 1 places countries along two axis. The first axis divides countries that explicitly prohibit copyright in some national works from those that specifically allow a national works copyright. The other axis provides the general degree of protection, separating countries based on whether they claim copyright protection for all national works (including laws), exclude copyright protection just for their laws, or prohibit copyright protection of all national works.

Table 1. Matix of Copyright Protection for National Works

	Nations Specifically Allowing the Copyrighting of National Works	**Nations with some Explicit Prohibition on Copyrighting National Works**
Protection for All National Works	Australia Canada[64] Cuba Hong Kong India Ireland Israel Nigeria Singapore United Kingdom	
Protection for Most National Works / Laws Not Protected	Belgium France Hungary	Argentina Brazil China

[63] TRIPS, art. 9(1), states: "Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971)." This necessarily includes Article 2(4) of the Berne Convention (which allows each member nation to set its own policy of protecting government works).

[64] Table 1 Note 1: Canada recently reviewed its policy of protecting its enactments and judicial decisions. It now allows free use of its national laws, simply imposing a duty to ensure the accuracy of any reproduction. This change in policy, though, does not cover provincial laws; provinces remain free to continue protecting their laws. John S. McKeown, FOX CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 363 (3rd ed. 2000).

	Sweden Thailand	Italy Poland Russian Federation Rwanda Saudi Arabia Spain Venezuela
Protection for Some National Works / Laws and Public Information Works Not Protected		Germany Greece Japan[65] Korea Netherlands[66] Switzerland
Exclusion of All National Works from Protection		United States

The matrix paints a clear picture. The United States has the strongest policy of not protecting its national works. The arbitrage potential is also clear: U.S. citizens and companies have no claim of free access to the works of other countries, while competitors in other countries may freely use United States federal works without permission or payment. This disparity is magnified by the vast scope and sheer number of United States federal works.

And another federal policy ensures the opposite arbitrage opportunity. In addition to leaving its federal works unprotected, the United States explicitly extends copyright protection to the works of foreign governments.[67]

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[65] Table 1 Note 2: Japan protects most of its government works, but explicitly allows free quotation in the media of government works prepared for public information. Even these public information materials, though, may be expressly prohibited from reproduction. *See* Copyright Act, Art. 32(2).

[66] Table 1 Note 3: The Netherlands has a general default allowing the free use and reproduction of government works. Government works, though, may be protected generally by law or specifically by placing a notice on the work. *See* Copyright Act, Art. 15b. (Such a specific copyright notice appears, for example, on Dutch currency.)

A review of the policies of other countries also yields some specific points of interest.

For example, some countries allow a national works copyright -- but cut the duration of it in comparison with privately-created works. Israel, for example, protects private works for the nearly-universal standard of the life of the author plus seventy years. Protection for government works, though, is limited to fifty years from the publication of the work.

Also, the countries that come closest to a total prohibition still allow national agencies to "opt out" and copyright national works. Japan and the Netherlands have fairly open policies (compared with other countries aside from the United States). Yet both authorize their governments to explicitly place individual works outside of the default policy of open access.

Noting how many countries protect their government works raises the question of how they manage the intellectual property. Canada provides a very interesting example. First, it allows an individual government work to be self-permitting, bearing a notice that it may be used without permission as long as any reproduction is accurate and acknowledged.

Permission to use other government works is granted through a central authority; the authority is located in the analogue to the United States Government Printing Office. The central authority is guided by a policy of granting permission. This default policy is constrained by specific reasonable standards. Permission will only be denied if the requested use would:

(a) be in an undignified context;
(b) be considered as an unfair or misleading selection;
(c) be used for advertising purposes in an undesirable manner;
(d) be used in a context that may prejudice or harm a third party;

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[67] United States Copyright Office, *Compendium II: Copyright Office Practices*, Section 206.3 (2002):

> Works (other than edicts of government) prepared by officers or employees of any government (except the U.S. government) including state, local, or foreign governments, are subject to registration if they are otherwise copyrightable.

(e) be considered inappropriate by the department in question for legal or other specifiable reasons.[68]

Permission is granted on set financial terms. Many uses are granted permission to use the government works at no charge. These include uses by non-profit organizations and uses that the owning agency finds to further its objectives. Also, no charge is made for "minor" uses, where government works make up less than 25% of the finished product.

Uses that require payment are licensed at one rate. The flat rate royalty is 10% of the net sales volume revenue. The royalty may be prorated to the proportion of government materials to the total work. The royalty also applies to government works put into electronic databases.[69]

The survey of other countries shows a variety of policies in effect across modern, information-age nations. The policy of the United States is at one extreme, and may benefit from being harmonized with the laws of its international trading partners.

B. States within the United States

State governments are not bound by the Copyright Act's prohibition on protecting federal government works.[70] Free to copyright their works, the various states have taken approaches that are, so to speak, all over the map.

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[68] Treasury Board of Canada, Circular No. 1986-25, dated June 11, 1986, on Crown Copyright, para. 7 and Schedule 1.

[69] *Id.* at para. 9.

[70] The Section 105 prohibition explicitly denies copyright protection for any "work of the United States Government". That term is defined in Section 101 as a "work prepared by an officer or employee of the United States Government as part of that person's official duties."

The very explicit focus on "United States Government" limits the reach of Section 105, so that the prohibition does not cover state and local government works. *See generally supra* notes 17-19 and accompanying text.

Some states have yet to enact intellectual property protection policies, while others have comprehensive programs to protect their works and actively manage copyrights. California, for example, falls into the latter category -- even offering seminars to educate state employees on managing and marketing state intellectual policy.[71]

These laboratories of legislation offer many aspects to be considered in any federal-level solution. A comprehensive survey of state copyright law is located at Appendix B, with major themes and unique highlights summarized here.

1. Super-Strong Protection.

Some states claim an extreme form of copyright coverage, extending even to protect state statutes and the judicial opinions of state courts.

This was a traditional arrangement when states lacked printing facilities. The copyright was a property interest that could be bartered in exchange for copies of the published laws for use by the state government.[72] The private printer would then profit from the monopoly by selling copies to other interested parties.

Direct sources of law like statutes and case law, though, have come to be seen by many scholars (and some courts) as improper subjects for copyright protection.[73] This is grounded in the right of due process. One court considering the issue defined the right quite succinctly: the

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[71] Stephen Fishman, THE PUBLIC DOMAIN : HOW TO FIND COPYRIGHT-FREE WRITINGS, MUSIC, ART & MORE 3/16 (2001).

[72] *E.g.*, Banks v. Manchester, *supra* note 14 (typical fact pattern of state offering copyright as consideration for "print, bind and supply the State with three hundred and fifty copies . . . of the Ohio state reports.")

[73] *See* L. Ray Patterson and Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719 (April 1989) (providing an excellent historical discussion and theoretical critique of copyright protection in statutes and case law).

public is entitled to "have notice of what the law requires of them so that they may obey it and avoid its sanctions."[74]

Still, some states persist in claiming copyright coverage for their laws. The claims have not been directly challenged, but commentators have predicted that the due process right would prevail over the state's claimed copyright. A popular guide to working with protected and public domain materials explains the situation for its lay audience as follows:

> For example, the State of California claims copyright in the regulations made available to the public on a state website. Regulations ordinarily have the force of law, so it's likely that copyright claims in state regulations are spurious and would not be upheld by the courts.
>
> Such state copyright claims would almost certainly not apply to your copying of state laws and regulations for your personal use, but the state might take action if you published or otherwise tried to commercially exploit them, for example, by publishing them in a book or on a website.[75]

And a leading treatise on copyright law reaches the same conclusions, albeit in terms familiar to legal practitioners:

> Failure to observe such due process notice requirements would certainly constitute a defense for one charged with violation of the nonpublicized law. It might well also justify, and perhaps require, the recognition of a fair use defense by one who reproduced such a copyrighted code for his own personal use. It may be doubted, however, whether it should also immunize from copyright liability a competitive commercial publisher . . .

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[74] *Building Officials*, 628 F.2d at 734 (holding that the due process right extended to a privately written building code that was officially adopted into law, so that the code could be freely copied), *but see* Del Madera Properties V. Rhodes & Gardner, Inc., 637 F. Supp. 262 (N.D. Cal. 1985), *aff'd on other grounds*, 820 F.2d 973 (9th Cir. 1987) (allowing copyright to continue in a privately-created land use map that all local development had to follow) *and* CCC Info. Servs. v. MacLean Hunter Market Reports, 44 F.3d 61 (2d Cir. 1994) (allowing copyright to continue in a privately-created book of used-car valuations required by state law to be used in insurance loss payments).

[75] Stephen Fishman, THE PUBLIC DOMAIN : HOW TO FIND COPYRIGHT-FREE WRITINGS, MUSIC, ART & MORE 3/22 (2001).

at least where the copyright owner of the code, or its licensee, has published and adequately disseminated authorized copies of the code.[76]

2. Special Entity Protection.

Many states invest specific state agencies with the authority to claim ownership in the intellectual property they create.

This is frequently seen in delegations to public institutions of higher education. State colleges and universities may be granted the authority to adopt their own policies to manage the intellectual property they create, or they may be confined to working within stated guidelines. Schools are a natural starting point for a state's intellectual property policy. They are typically the most obvious centers of research and development -- and have been since long before the more encompassing modern view of intellectual property. Some critics have questioned the impact of patenting and copyrighting upon the informal, collaborative nature of academia; this parallels the tension between the incentive effects of both free and protected access to works.

Nonetheless, universities are increasingly pursuing aggressive protection and management policies. They are entering long-term licensing agreements with private companies,[77] distributing protected educational content through long-distance learning,[78] and

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[76] Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT (2002), § 5.06[C] at 5-92.

[77] The University of Michigan, for example, explicitly defines its patent policy to include working with commerical parties:

> The objectives of the technology transfer and intellectual property development activities of the University shall be: to facilitate the efficient transfer of knowledge and technology from the University to the private sector in service of the public interest; to support the discovery of new knowledge and technology and to attract resources for the support of University programs; to provide services to the University faculty and staff to facilitate their efforts to carry out the University's mission; and, to promote local and national economic development.

otherwise using intellectual property laws to expand the reach of their research and education missions.

State governments are beginning to mirror the creative environment of universities, forming entities to spur development in the arts and sciences within the state. A prime example is the Arkansas Science and Technology Authority, which the state authorized to "own and possess patents, copyrights, and proprietary processes and to enter into contracts, and establish charges, for the use of such patents, copyrights, and proprietary processes involving science or technology".[79]

These other state entities often follow the policies set out by the pioneering universities, particularly the incentive structure that rewards individual employee-creators and the employing agency.

University of Michigan, *Revised Policy on Intellectual Properties: Including Their Disclosure, Commercialization, and Distribution of Revenues From Royalties and Sale of Equity Interests* (1996) (available at http://www.techtransfer.umich.edu/inventors/policies.html).

[78] An excellent review of university licensing policies is contained in Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 Vand. L. Rev. 1162 (May 2000), noting:

> At one time, universities largely ignored copyrights, probably because scholarship rarely paid off in a financial way. The output of computer science departments led to a change in outlook and the advent of the internet, which allows universities to package and distribute teaching materials as "distance learning," further enhances their interest. Accordingly, as universities revise their policies on patents, they now also consider copyrights. A few treat copyrights just like patents: they consider the faculty (or student) author as the legal author. However, they then require an assignment of rights in any work made with substantial university resources. In exchange, the university agrees to handle administrative matters and to share royalties with the creators.

Id. at 1185.

[79] Ark. Code Ann. 15-3-108 (2001).

3. Special Subject Matter Protection.

Some states authorize intellectual property protection for special subject matter. The claimed matters can be a type of property (particularly computer programs), an area of special interest to the state (like Idaho's image as a leading potato producer), or a specific state-run program (such as with lotteries).

a. Subject Matter Embodiment

Several state governments explicitly claim copyright protection for state-developed computer programs. Just as state universities were a traditional obvious entity to protect, state computer programs are a tangible intellectual property product to protect. State governments can see the investment in computer programs, as well as the revenue created in the private sector by licensing them.

Some states address the issue quite simply. Alaska, for example, authorizes municipalities to "hold the copyright for software created by the municipality or developed by a contractor for the municipality".[80] And -- to clarify the importance of holding copyright -- it then authorizes the municipality to "enforce its rights to protect the copyright."[81]

Other states have taken a very comprehensive approach, perhaps recognizing the unique position of software in the world of intellectual property law. Software sits at the major intersection of three areas of intellectual property protection.[82] For most of its early

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[80] Alaska Stat. 29.71.060 (2001).

[81] *Id.*

[82] Indeed, many commentators have suggested sui generis regimes to protect software. See Pamela Samuelson *et al.*, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308 (1994) (proposing a bifurcated system to protect both the functional "behavior" of a program and the incremental value of the text of the program) and Peter S.

development, software was protected only by trade secret law.[83] This forced owners to take particular steps to keep control over their software. In addition to the basic difficulty of keeping software "secret", the state-based nature of trade secret law opened owners to a patchwork of protection. Copyright protection for software was explicitly added to the Copyright Act in 1980,[84] and patent protection was recognized for computer programs in 1981.[85] These changes offered software creators clearly defined federal systems of protection.[86]

Iowa displays a recognition of the different methods of protecting computer software:

> A government body is granted and may apply for and receive any legal protection necessary to secure a right to or an interest in data processing software developed by the government body, including but not limited to federal copyright, patent, and trademark protections, and any trade secret protection available under chapter 550. The government body may enter into agreements for the sale and distribution of its data processing software, including marketing and licensing agreements. The government body may impose conditions upon the use of the date processing software that is otherwise consistent with state and federal law.[87]

Menell, *Tailoring Legal Protection for Computer Software*, 39 Stan. L. Rev. 1329 (July 1987) (recommending a short-duration scheme of protection for the typically brief life-cycle of most software programs).

[83] Alfred P. Ewert and Irah H. Donner, *Will the New Information Superhighway Create 'Super' Problems for Software Engineers? Contributory Infringement of Patented or Copyrighted Software-Related Applications*, 4 Alb. L.J. Sci. & Tech. 155 (1994).

[84] Codified as amended at 17 U.S.C. 101 (2002).

[85] *See* Diamond v. Diehr, 450 U.S. 175 (1981) (holding that a new and useful process embodied in a computer program may be patented).

[86] Note, though, that the extension of copyright and patent protection came with a cost to software developers; their infringement analysis increased dramatically. Under the trade secret regime, programmers simply needed to guide their actions away from the active deed of misappropriation. Copyright law raised the specter of contributory negligence. And patent law added the possibility of unknowing infringement of other patents -- even patents not involving another computer program. The programmer of software to select stocks for a mutual fund, for example, now must search for issued patents on the algorithms she plans to encode -- even for patented steps involving only pen and paper. *See* Ewert & Donner, *supra* note 83.

[87] Iowa Code Ann. 22.3A (2002).

b. State-Specific Areas of Special Interest

Other state protections center around special interest areas for the state. The special interest often involves items of pride or competitive advantage for the state. Many of these are grounded in trademark law. Idaho, for example, prohibits slogans that infringe its trademarks of "Idaho Potatoes," "Grown in Idaho," "Famous Idaho Potatoes," or "Famous Potatoes".[88] Similarly, Florida claims ownership of "Keep Florida Beautiful"[89] and Wyoming regulates licensing of its "Bucking Horse and Rider".[90]

Even the trademark-centered protections, though, often recognize that copyright frequently intertwines with trademarked phrases and images. Missouri authorizes its Division of Tourism to market "special items" that promote tourism, defining the term quite expansively to include not only logos but also patentable and copyrightable materials owned by the state.[91] Florida has authorized its Florida Institute of Phosphate Research to protect and enforce its rights in any work products through copyright law (in addition to securing patents and trademarks).[92]

c. Enabling State-Run Programs

State-run programs are often given authority to manage intellectual property deemed integral to their specific missions. This authority, for example, is generally granted to a state-run lottery program. The authority may also be backed with an exemption from releasing information under a state analogue to the Freedom of Information Act. This pairing is seen in

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[88] Idaho Code 49-402C (2000).

[89] Fla. Stat. Ann. 15.041 (2002).

[90] Wyo. Stat. Ann. 8-3-117 (2001).

[91] Mo. Ann. Stat. 620.466 (2000).

[92] Fla. Stat. Ann. 378.101(2)(a) (2002).

Kentucky law, which authorizes its Kentucky Lottery Corporation to "hold copyrights, trademarks, and service marks, and enforce its rights with respect thereto"[93] and further protects the security of the lottery by exempting release of information under the state's open records law.[94]

C. Protection of Other Federal Intellectual Property

Some interesting lessons can be drawn from an area in which the federal government explicitly retains intellectual property rights: patent law. The federal government invests research dollars and employee efforts that result in both patentable products and copyright-worthy works. Yet the patenting of federal effort is encouraged,[95] while copyrighting it is prohibited.

The development of the federal patenting policy is particularly instructive. Federal funding has long supported scientific research in universities. Until two decades ago, though, all inventions created with federal funding belonged to the federal government. Accepting federal assistance denied scientists and universities any rights in resulting inventions. Scientists agreed with the policy, believing that the public owned the research that it funded.[96] Federal policy

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[93] KRS § 154A.060(1)(c) (2001).

[94] *Id.* 154A.040(1)(c) (2001).

[95] The results of federal efforts are encouraged to be patented through an incentive structure that reward employees and agencies with licensing royalties. This structure is discussed in more depth *infra* notes 253-263 and accompanying text.

Encouragement can also take a more direct form. Entities that receive federal research funds -- universities, for example -- must pursue patent protection if they elect to retain title under the Bayh-Dole Act. 35 U.S.C. 202(c)(3).

[96] Tamsen Valoir, *Government Funded Inventions: The Bayh-Dole Act and the Hopkins v. CellPro March-in Rights Controversy*, 8 Tex. Intell. Prop. L.J. 211, 212 (Winter 2000).

sought to publicize the research, so the federal government rarely patented these inventions; unpatented, the inventions lapsed into unprotected public use.

This policy changed abruptly in 1980. The policy of free access became to be seen as wasting the nation's investment in applied research, with inventions going undeveloped domestically and even providing profits to foreign "free riders".[97] Scientists and businesses were unwilling to invest in further development of the research, since they had no private property rights to protect their work from being duplicated by other manufacturers. The policy also left the research open to use by foreign countries and firms; their economic models, perhaps focused more on manufacturing than research, could allow them to make and market the products without paying for any of the research (directly or through taxes).

In 1980, two new laws were passed to correct the policy of free access. One focused on federal laboratories; the Stevenson-Wydler Act[98] sought to facilitate the transfer of technology from those labs to private industry.[99] The other new law involved federally-funded research outside of the government laboratories; the Bayh-Dole Act explicitly allowed universities and other recipients to retain ownership of their inventions, patenting and licensing them for further development and marketing.[100]

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[97] John M. Golden, *Biotechnology, Technology Policy, and Patentability: Natural Products and Invention in the American System*, 50 Emory L.J. 101, 120 (Winter 2001).

[98] Stevenson-Wydler Technology Innovation Act of 1980, Pub. L. No. 96-480, 94 Stat. 2311 (1980) (codified as amended at 15 U.S.C. 3701-3714).

[99] 15 U.S.C. 3710 (2002).

[100] Patent and Trademark Amendments Act, Pub. L. No. 96-517, 94 Stat. 3015 (1980), as amended Pub. L. No. 98-620 (codified as amended at 35 U.S.C. 200 et. seq.).

The success of the new laws led to the Federal Technology Transfer Act of 1986. The FTTA allowed government owned laboratories to combine development efforts with non-federal entities.[101] It also directed a portion of patent royalties to federal employee-inventors.

The act contains some interesting restrictions. One restriction requires that the licensed inventions be manufactured substantially in the United States.[102] This built-in preference directs the benefits of federal funding to American businesses. It can also be seen as a specific method of containing the further fruits of such research: material sales, manufacturing jobs, and similar activities that return tax revenue to the nation's coffers.

Another restriction empowers the federal government with a "march in" right.[103] Under this right, an unproductive licensee may be compelled to grant a reasonable license to a third party (or the federal government itself may grant the license). This critical right acts as a safety valve on the patent's monopoly. The licensee must honor his consideration for the bargain -- efficient exploitation -- in order to enjoy the benefit. Note, though, that the government has

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[101] The rights and responsibilities of the joint venture are written into a Cooperative Research and Development Agreement, or "CRADA". CRADAs are typically created for a specific research project, and detail what the federal laboratory and its research partner will contribute in terms of personnel, property, and services. In addition to these resources, the research partners may also contribute funding to the project. *See generally* Kevin W. McCabe, *Implications of Cellpro Determinations on Inventions Made with Federal Assistance: Will the Government Ever Exercise its March-In Right?*, 27 Pub. Cont. L.J. 645, 650-54 (1998) (describing the formation of a CRADA in the context of a larger discussion of legislation that promotes transfer of federally-funded technology).

[102] 35 U.S.C. § 204 (2002) (the public policy is clearly stated in the title of the code section: "Preference for United States Industry").

[103] 35 U.S.C. § 203 (2002) (triggering the possible compulsory license if: (a) effective steps toward practical application are not taken in a timely manner; (b) public health or safety demands it; (c) other regulations require it; or (d) the Bayh-Dole agreement transferring title is breached.

never exercised this march in right.[104] Commentators attribute this to such diverse causes as efficient exploitation driven by market forces[105] and overly burdensome procedures to invoke the right.[106]

Moving from free access to protected access has successfully spurred the development of federally-funded research. Patents issued to universities increased by an order of magnitude since the passage of the Bayh-Dole Act, from 220 in 1979 to 3079 in 1999.[107] Royalties to universities from patent licensing experienced a similar ten-fold increase.[108]

This experience with patent-worthy federal research provides an interesting model for copyright-ready works. The federal government makes substantial investments in research that yields both types of results. Indeed, many individual research projects result in both types of intellectual property.[109] Yet currently only the patentable results are protected for a productive return.

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[104] David S. Bloch and James G. McEwen, *"Other Transactions" with Uncle Sam: A Solution to the High-Tech Government Contracting Crisis*, 10 Tex. Intell. Prop. L.J. 195, 206 (Winter, 2002).

[105] *Id.*

[106] Kurt M. Saunders, *Patent Nonuse and the Role of Public Interest as a Deterrent to Technology Suppression*, 15 Harv. J. Law & Tec 389, at note 326 (Spring 2002).

[107] Valoir, *supra* note 96, at 234.

[108] *Id.*

[109] An individual research project could result in separate intellectual property products, perhaps a patentable process and a copyrightable manual describing practical uses for the process. It is also possible for a single product (like computer software) to be protected under patent law in some aspects and copyright law in others.

IV. Pro-Status Quo Policy Arguments

Several valid arguments support the current prohibition on federal copyrights. Some of these arguments have been touched upon in previous sections of this paper, but each deserves further discussion. Any change to the current policy must be fully aware of the concerns supporting the existing prohibition.

A. Citizens Need to Know the Law:

A core argument against copyrighting federal works holds that citizens must have access to the laws that govern their actions. Restrictions should not keep people and organizations from understanding their rights and responsibilities. If ignorance of the law is no excuse, as the adage states, then it should be equally axiomatic that citizens must be able to learn the law they are charged with upholding. To do otherwise would violate basic norms of due process.

The defendant in a very early case on copyrighting judicial opinions summed up the danger, understandably, in the extreme:

> If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide our actions. If there be any effect derived from the assertion, that the judges furnished their decisions to the reporter, the gift would be both irrevocable and uncontrollable, even by the judges themselves. The desires of the court to benefit the public, and the wishes and necessities of the public to receive the benefit, might alike be frustrated by a perverse or parsimonious spirit. [* * *] It might become the interest of such a person to consign the whole edition to the flames, or to put it at inaccessible prices, or to suffer it to go out of print before the country or the profession is half supplied.[110]

Public understanding of the law comes through two broad channels. The first channel is the citizen accessing information directly from her government. This happens both through a "push" from the government (as with income tax preparation tax guides sent to each taxpayer

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[110] *Wheaton*, 33 U.S. (8 Pet.) at 621 (answer of the defendant).

each year) and when the citizen "pulls" works through a direct request (for, say, a consumer protection guide from the Federal Consumer Information Center in Pueblo, Colorado).

Both directions of this channel are protected by existing legal mechanisms. Most federal agencies are specifically charged with creating particular works to distribute to the public. Indeed, some agencies are primarily concerned with creating and distributing works to the citizenry.

United States citizens have a great tool, too, for "pulling" works from their government: the Freedom of Information Act (FOIA).[111] The Freedom of Information Act opens a world of government works, all available through a simple request. The requestor does not need to explicitly mention the Act or even specifically name the document(s) requested. The Act also places the burden on the government to respond quickly to a request with either responsive information or an explanation of why the information cannot be released.[112]

Some works are exempted from release under the Freedom of Information Act, but the handful of exemptions are narrowly-drawn. Most of the exemptions involve privacy, holding one individual's right to privacy higher than another individual's right to have that information disclosed.[113] (Note, though, that the individual is generally allowed access to their own

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[111] 5 U.S.C. § 552 (2002).

[112] *Id.* at § 552(a)(6)(A)(i) (giving the federal agency twenty business days to respond to FOIA requests).

[113] The concern for privacy is found in several FOIA exemptions. For example, the Act exempts the release of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". 5 U.S.C. 552(b)(6). The "unwarranted invasion of personal privacy" yardstick is also used to measure the release of law enforcement information. 5 U.S.C. 552(b)(7)(C) Privacy is also protected by exempting the release of trade secrets and confidential information received from individuals. 5 U.S.C. 552(b)(6)

information through the Privacy Act.)[114] Other FOIA exemptions are grouped under the broad umbrella of "law enforcement", protecting the disclosure of -- among related things -- particular proceedings,[115] confidential informants,[116] and techniques that could lead to circumvention of the law.[117] The remaining exceptions carve out very narrow areas of interest, such as protecting the release of reports involving the "supervision of financial institutions",[118] geological information concerning wells (including maps),[119] and intra-agency personnel policies.[120]

The overwhelming majority of federal government works are available through the Freedom of Information Act. The exemptions are well-defined and non-disclosures may be challenged in district court[121] (which is explicitly empowered to award the requestor's reasonable attorneys fees).[122] Each year, some five thousand federal officials respond to two million FOIA requests.[123] These figures are supplemented by an unknown (but massive) number of documents viewed directly by request in "electronic reading rooms"; such rooms are required so that agencies harness the ability of technology for speeding the dissemination of government works.

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[114] 5 U.S.C. 552a (2002).

[115] 5 U.S.C. 552(b)(7)(A).

[116] 5 U.S.C. 552(b)(7)(D)

[117] 5 U.S.C. 552(b)(7)(E)

[118] 5 U.S.C. 552(b)(8)

[119] 5 U.S.C. 552(b)(9)

[120] 5 U.S.C. 552(b)(2)

[121] 5 U.S.C. 552(a)(4)(B)

[122] 5 U.S.C. 552(a)(4)(E)

[123] Ellen Nakashima, *Bush View of Secrecy Is Stirring Frustration; Disclosure Battle Unites Right and Left*, THE WASHINGTON POST, March 03, 2002, at A04.

Citizens currently learn the law through this push and pull of information. This is illustrated through a most pervasive example: the federal income tax. The Internal Revenue Service "pushes" the basic tax guide and forms to taxpayers each year; this information addresses the common rights and responsibilities of citizens under the tax collection laws. Individuals desiring more information can "pull" it from the IRS through the service's distribution channels (for common additional guidance) and also through the Freedom of Information Act (for more obscure information). Information related to an individual (perhaps an analysis of past years' tax returns) may be protected from disclosure to others under FOIA, yet releasable to the individual under the Privacy Act. By working directly with the government, the citizen comes to understand their individual legal rights and responsibilities.

It should be noted, though, that the current policy of free use does not ensure citizens have no-cost access to the law. The citizen looking through federal statutes and case law in a local law library is most likely using privately-published books costing many thousands of dollars each year.[124] Having paid a little for the law to be created in the government, the taxpayer then pays a lot to private enterprise to deliver the law to the library.

B. Democracy Demands Information

Democracy is one of the most information-intense forms of government. It is based on its citizens electing representative policy makers, and it increasing relies on the direct participation of its citizens in guiding policy through initiatives and referenda that directly enact or repeal laws. Such important decisions demand to be based on full information.

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[124] Alternative sources for statutes and case law are increasingly available, particularly on the Internet. Some are privately owned, while others are operated by the federal government (including THOMAS, the legislative resource operated by the Library of Congress, available at http://thomas.loc.gov/).

The government is the main source for much of this information, and the sole source for some, too. Unfettered access to this information forms the basis for one strong argument supporting the current ban on federal copyright.

Quite logically, this argument also supports the Freedom of Information Act. Indeed, it was the central theme noted by President Lyndon Johnson in his official statement upon signing FOIA into law on Independence Day in 1966:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.[125]

President Johnson's theme was fully in accord with the House and Senate Reports on the Act.[126] It has also been echoed -- and amplified -- in many judicial opinions, including at the level of the Supreme Court:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.[127]

> The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.[128]

The importance of information to the citizens of a democracy has also been commented on in the negative:

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[125] Statement by the President upon Signing S. 1160, available from The National Security Archive of The George Washington University at http://www.gwu.edu/~nsarchiv/nsa/foia/FOIARelease66.pdf

[126] *See infra* note 204 and accompanying text.

[127] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[128] EPA v. Mink, 410 U.S. 73, 105 (1973) (Justice Douglas, dissenting, quoting from The New York Review of Books, Oct. 5, 1972, p. 7).

> The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion. Government may add its own voice to the debate over public issues, but it may not attempt to control or reduce competition from other speakers. When the state creates an organ of the press, as here, it may not grant the state press special access to governmental proceedings or information and then deny to the private press the right to republish such information. Such actions are an exercise of censorship that allows the government to control the form and content of the information reaching the public.[129]

Our society functions best with more information on government functions, most commonly received as reported by the media.

This comprehensive government-to-citizen system is supplemented by private industry. In addition to working directly with the Internal Revenue Service, the citizen can turn to hundreds of income tax guidebooks, tax preparation computer programs, and consultants that advise and prepare individual tax returns. All of these services are provided by the private sector -- yet rely heavily on federal government works.

Private sector commercial actors extend far beyond this simple tax example. In virtually every government-to-citizen channel, a "value-added" private industry has arisen to aid the direct interaction of the citizen with her government.

The earliest -- and broadest -- of these is collectively know as "the media". Citizens learn about their government primarily through the media -- newspaper articles, television and radio broadcasts, and the like. The media may alert a citizen to a right or responsibility she might not have known, or it may clarify the impact of an already-known law. Such an alert may spark an individual to begin "pulling" more information directly from the government. It might also create a critical mass of knowledgeable citizens able to effect a change in their government, where each citizen alone could not.

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[129] Legi-Tech, Inc. v. Keiper, 766 F.2d 728, 733 (2d Cir. 1985) (citations omitted)

The media uses a great range of government content. Some "commercial" channels are mainly re-broadcasters of government works. C-SPAN is a very "pure" example of this end of the spectrum.[130] The channel was established in 1979 as a private entity by a collection of cable television systems. It meets its mission "to provide public access to the political process" by televising hearings directly from the Senate and House of Representatives. Aside from off-peak shows, the only editorial or "value-added" work of the channel consists in selecting which hearings to televise at a particular time; even that work has been lessened by the addition of sister channels to air concurrent hearings.

The other end of the spectrum might be the traditional newspaper editorial. While a law may be the focus of the editorial, the government work is only the starting point or platform. The media provides nearly all of the content through the commentary of the editorial author.

The middle of the spectrum is a wide range of publications that track particular areas of government activity. These are often aligned along sectors of industry. Shipbuilders, petroleum refiners, and biomedical researchers -- to name but a few examples -- all have specialized publications that explain existing legal requirements and alert subscribers to changes in government policies.

Both ends of the spectrum -- and the range in the middle -- are valuable. The media adds value to the government information, whether by simply reaching more people with the government works (as with C-SPAN) or by collecting disparate government works in one publication (as with the industry newsletters) or by commenting on the government work in an intriguing or entertaining way (as with newspaper editorials).

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[130] "C-SPAN" stands for "Cable Satellite Public Affairs Network".

The value added to government works by the media, though, is comparable to that added to sporting events, travel, and other items of social interest. A key difference is that media channels often pay for these other works. While C-SPAN broadcasts congressional testimony while paying no fee, other television networks pay billion of dollars each year to broadcast National Football League games.[131] A cynic might point to the average salary of the "content provider" being much higher in the NFL than in Congress.[132] Paradoxically, though, the salary figures contradict the real impact that a legislator will have and therefore the real interest that the public should have in the legislator's work.

Nonetheless, the traditional role of the media cautions against changing the policy to allow the copyrighting of federal government works. Blanket copyrighting enforced to the maximum extent would trigger first amendment concerns. As the Supreme Court succinctly noted:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press [* * *] to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.[133]

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[131] Leonard Shapiro, *NFL's TV Plan Delayed*, THE WASHINGTON POST, March 28, 2002, at D01 (noting , though, that the payments are likely to be too high for the market, projecting: "ABC, Fox and CBS will lose a combined $ 2.9 billion on their eight-year, $ 17.6 billion NFL contract").

[132] The average annual salary for NFL players recently topped $1.2 million, while Senate salaries are little more than one-tenth of that amount.

[133] Mills v. Alabama, 384 U.S. 214, 218 (1966).

This concern naturally affects "wholesale" rebroadcasters more than commentators. The "fair use" doctrine of copyright would likely allow the continued use of facts and minor excerpts. Thus, the news reporter and editorialist would continue unfettered. Publishers and broadcasters, though, who primarily simply retransmit government works could expect to come under copyright restrictions (with attendant concerns).

Chief among these concerns is equal access to the works. That concern is discussed in depth at Section IV(D) of this paper, where several solutions are suggested to lessen and even cancel out the potential problems of unequal access.

Other private sector actors assist citizens understand the law. They often use federal government works even more directly than the media. Their uses fall along a range similar to the media. This can be clearly seen in legal publications. At one extreme, a legal treatise may fundamentally rely on statutes and cases of the federal government -- yet consist mainly of original commentary and organization. As with traditional news reports and editorials, such a treatise would probably not be affected if the underlying federal works were copyrighted (with its use of those works consisting of "fair use" excerpts and commentary).

At the other extreme are works like statute books and case law reporters. These consist mainly of federal government works, reprinting statutes and judicial opinions as they are issued by Congress and the courts. Publishers will often cross-index related statutes, synopsize the case law, and otherwise add some value, but the bulk of their publications are the basic federal government works. As with the media rebroadcasters, these republishers would be greatly impacted by the imposition of a federal works copyright.

A central tenet of this theory is that a federal works copyright would lessen the availability of information through these private sector channels. This tenet appears in two forms, one economic and one political.

The economic basis branches into two areas of concern. One concern is that a copyright would require payment of royalties, and that such payments would make it financially unfeasible to publish government works. The burden of paying to use government works might also cause private publishers to change their distribution plans, raising the price to pass along the royalties -- with the higher price ultimately lowering the number of copies sold.

This concern has merit, but likely overstates the danger. Private publishers currently show no benefit in pricing their works that involve federal government works. "Popular" publications are sold at prices comparable to other mass-market books. For example, the set of Supreme Court oral arguments is sold at no apparent discount from collections of privately copyrighted speeches.[134] The publisher's savings in using royalty-free federal government works are no more apparent in more specialized works. A year's worth of federal appeals court opinions, for example, cost $4,000 from a private publisher (who pays no royalties on the federal government works that make up over 95% of the each volume). And many computerized legal

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[134] Indeed, the commercial publisher astonishingly places a premium on the freely-accessible, no-cost recordings of the court. The six-cassette collection of MAY IT PLEASE THE COURT *(see infra* notes 219-225 and accompanying text) carries a suggested retail price of $75. Another popular, historically-vital six-cassette collection of recordings -- A KNOCK AT MIDNIGHT: INSPIRATION FROM THE GREAT SERMONS OF REVEREND MARTIN LUTHER KING, JR. (edited by Peter Holloran and Clayborne Carson, 1998) -- has a suggested retail price of $26.98, despite being private, protected works.

In the neighboring right of protection in recordings of musical performances, vendors of unprotected performances of the United States Air Force Band and other service bands price their compact discs at the prevailing rate of other discs -- although they pay no upfront performance fees, continue royalties or other costs for the taxpayer-sponsored military bands.

research services are commercial, charging an equal price for the use of both uncopyrighted federal government works and other, copyrighted, legal works.[135]

If private publishers currently pay no royalties, yet still charge full market prices, then there is presumably some room in the profit model to pay for the use of federal government works.

The other financial concern warns that political pressures may be imposed through financial arrangements. The basic political concerns are discussed in more depth in Section IV(D) of this paper, but essentially suggest that a political party in power will let its members use copyrighted federal works and deny political opponents the permission to use the works.

C. Citizen Authorship

Another theory supporting the prohibition on a federal works copyright can be termed "public as author" or "citizen authorship". The taxpayers' financial support through taxes -- and guidance through elected officials -- is seen as buying ownership of the works of the federal government, with full access and use.

This theory draws logically enough from the core copyright principle of "works made for hire". The principle recognizes that creativity and capital are often held by separate parties. A particular work may require both resources. The principle bridges the two, so that a party with capital can hire the creation and then own the resulting work.

The theory is generally contemplated in terms of a company hiring a creative individual. Technically, a "work made for hire" must fall into a specific type of creation and be covered by a

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[135] Some actually bill their use, while others "charge" by subjecting the user to advertising while using the site.

written agreement.[136] More broadly, though, any work can be created by one person and assigned to another person or entity.

The financial aspect is also sometimes raised to prevent "double payment", with judges receiving both their salary (from taxpayers) and royalties (from publishers) for the same documents. An early case made the link quite clearly: "Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors."[137]

The typical "work made for hire" arrangement involves both a financial agreement and some guidance in the work to be done. The element of guidance is particularly important to the concept of "citizen authorship"; in a democracy, the laws are created by the elected and appointed representatives of the people. This was stressed in a fairly recent case (which found support for the concept even a century before):

> The cases hold that the public owns the law not just because it usually pays the salaries of those who draft legislation, but also because, in the language of *Banks v. West*, 27 F. 50, 57 (C.C.D.Minn.1886), "Each citizen is a ruler, a law-maker." The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.[138]

In its current form, though, citizen authorship unfairly burdens the taxpayer in several ways. First, it benefits non-citizens and non-taxpayers equally as well as citizens and taxpayers. Foreign firms and individuals may freely use United States federal government works. Indeed,

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[136] 17 U.S.C. 101, 201(b) (defining the requirements of "work made for hire").

[137] *Banks,* 128 U.S. at 253.

[138] *Building Officials*, 628 F.2d at 734.

roughly half of all requests for copies of federally-sourced computer programs have come from Japanese companies.[139]

The Japanese companies and others may freely use such computer programs and other works, even though they fail both elements of the citizen authorship theory: they contribute no "guidance" (not having the citizens' elected representatives) and they provide no "sponsorship" (not paying taxes). Having no authorship in the works should result in no ownership of them, yet the current approach allows the free use of such works for any purpose (including profitable uses).[140]

The inequality is magnified when the user is in a country that claims a copyright in its government works. The majority of countries do claim such a copyright.[141] The lack of a comparable copyright in United States federal government works prevents any opportunity to barter for reciprocal free use of foreign government works by United States citizens.

The second burden of citizen authorship applies to domestic firms, too: some firms and industries rely more heavily on federal government works. To the extent they do, they are subsidized by taxpayers. With no copyright in federal government works, there can be no

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[139] *Legislation: House Panel Witnesses Endorse Copyright for Government Software*, 42 Pat. Trademark & Copyright J. (BNA) 291, 292 (July 25, 1991) (citing testimony of law professor James Chandler, who noted that 48% of the requests to U.S. public software libraries come from Japanese companies).

[140] One commentator has suggested that the Section 105 prohibition was not meant to apply outside of the United States, finding support in a comment in the legislative history of the Copyright Act of 1976 -- but noting just a single (and unsuccessful) attempt to enforce the theory. *See* William Patry, *Choice of Law and International Copyright*, 48 Am. J. Comp. L. 383, text of note 71 (Summer 2000).

[141] *See supra* § III(A).

system that identifies the beneficiaries and the extent of their subsidies[142] -- much less any way of recapturing some of the hidden subsidies to benefit all taxpayers.[143]

Finally, the lack of a copyright for federal government works burdens the taxpayer with perpetually funding efforts that might be partially self-supporting. Many government activities are directed to the common good -- tasks that benefit the public at large, but that no single person or firm could profitably perform.

These tasks are often impossible for the private sector to perform due to the "tragedy of the commons". This is traditionally described in terms of a common park, which everyone is free to enjoy -- but that no one is responsible for maintaining. The park quickly falls into disrepair, since no one has an interest in cleaning it just so that others can continue using it without sharing any of their efforts. This "free-rider" rider problem is seen in government activities as disparate as national defense and education; everyone benefits, but a discrete price cannot be put on one person's interest in a safe and educated society. Approached from a

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[142] The need to clarify subsidies is discussed in more depth *infra* § V(C).

[143] It can be argued that some of the free use subsidy is recaptured through the basic tax system. A greatly simplified income statement shows this effect, with free raw materials resulting in a greater profit -- which, in turn, results in a greater tax payment:

	Information Co. (under current free use policy)	Information Co. (if paying royalties for use)
Revenue	1,000,000	1,000,000
less: Royalty Costs	- 0	- 250,000
Personnel Costs	- 500,000	- 500,000
Income	500,000	250,000
less: Tax Owed (at 50%)	- 250,000	- 125,000
Net Income (Profit)	250,000	125,000

Under the current free use policy, the hypothetical company would owe an additional $125,000 -- double the tax of the royalty-paying company. Note, though, that the free use company still has the advantage; using $250,000 in materials at no cost, puts it $125,000 ahead in profit -- even after paying more in tax. So, even after recapturing some of the subsidy through the tax system, the current free use policy provides a substantial hidden subsidy.

different direction, the same level of government activity could continue if one citizen failed to contribute. That citizen would continue to benefit just the same -- but those activities would begin to fail if a significant number of citizens started failing to contribute.

Other activities are entrusted to the government due to the massive investment required. For example, private toll roads exist over limited distances, but constructing and maintaining the national highway system is far beyond the scope of any private company (or even collection of companies).[144]

Potentially copyrightable federal government works fall into both of these categories. Population analysis through the national census[145] is an example of both categories, requiring massive resources for a project that benefits everyone -- but that no private company would benefit enough from to perform on its own.

And other government activities often "spin off" potentially copyrightable federal government works. A single Department of Defense project to test a new airframe, for example, might result in computer programs, technical training manuals, and other tangible works that private industry could profitably employ in other areas.

Whichever category a particular government work falls into should not preclude recovering the taxpayers' investment. Even if benefits for the overall task cannot be apportioned,

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[144] The Dwight D. Eisenhower System of Interstate and Defense Highways has been called the "largest public works project in history", covering 42,800 miles and constructed at an estimated cost of $130 billion. The return on the taxpayers' investment has been substantial, yielding an estimated $6 for each $1 of construction cost -- as well as saving an estimated 187,000 fatalities in its first four decades. Fluid Power Journal, *Top Ten Construction Achievements of the 20th Century: The Dwight D. Eisenhower System of Interstate and Defense Highways*, Certification Issue (2000) (available at http://www.fluidpowerjournal.com/).

[145] U.S. Const., art. I, § 2, cl. 3.

individual works might be measured from within the broad activity. Once measured, they could be protected by copyright and managed for the benefit of the overall project.

Not measuring and recovering for the works unfairly burdens the "citizen authors". It forces their subsidization of an entire project when some portions could "pay their own way", reducing the overall financial burden of the project.

D. Equal Access to Information

Licensing raises questions of bureaucratic bias, whether by outright denial of information, through pricing schemes, or in selective prosecution. The political basis warns that using federal government works would become dependant upon gaining permission of the copyright holder, and that permission might be withheld for political reasons.

The basic political concern is well-founded. The first copyright law was imposed by the British monarchy to prevent the publication of heretical and seditious works. The law governed all printing presses and required printers to obtain royal approval of every work before printed and copyrighted. This history of direct government censorship through copyright understandably heightens concerns about a system of copyrights for federal government works.

One political-based concern involves the threat of a federal agency generally withholding works it considers embarrassing. The agency itself is generally the best source of information on its mission, and often the only source for some internal works that may be inconsistent with stated policies (either through error or exploration). Yet agencies are also concerned with presenting a consistent image of competence to the public.

This creates a built-in tension. The response to this tension has been seen in the Freedom of Information Act and First Amendment settings. Some agencies have responded by withholding information that could possibly embarrass the agency.

The preeminent case of this involved the "Pentagon Papers".[146] In this First Amendment case, the federal government sought to suppress the publication of classified reports on the Viet Nam conflict. The reports were meant to be used internally for national security purposes, and detailed the history of the government's decision making process in the conflict. The Supreme Court allowed the New York Times, the Washington Post, and other newspapers to publish the reports. The political purposes for withholding the reports -- whether the claimed interest of national security or simply to save embarrassment -- were deemed to fall before the free press' "duty to prevent any part of the government from deceiving the people".[147]

The other political basis warns of discriminating releases. Rather than the general withholding of information from everyone discussed above, this concern cautions that a federal government copyright could be used to release works only to favored parties. The converse, naturally, is that works could be improperly withheld from others.

Some have warned of outright political discrimination. In the worst scenario, a federal agency head appointed by one political party would simply refuse to license the agency's works to anyone affiliated with another political party.

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[146] New York Times Co. v. United States, 403 U.S. 713 (1971).

[147] Justice Black's concurrence singles out national security, making the balance quite clear:

> The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.

Id. at 717 (Black, J., concurring).

This hypothetical may be useful in highlighting the potential danger. But it must be understood as an extreme conjecture. Such blatant political discrimination has rarely been seen in existing release mechanisms;[148] extreme political bias has not been the subject of litigation under the Freedom of Information Act, for example. This may be attributed to a number of factors, ranging from a sense of duty that transcends political parties to the perceived risk of detection and punishment for blatant acts.

Political discrimination is more likely to appear in more subtle forms, if at all. Subtlety can take two forms here. "Delegated discrimination" might draw less scrutiny, while "built-in" political preferences would withstand stronger challenges.

If the licensing policies leave great discretion at low levels, then political preferences may go unnoticed (or, just as importantly, unprovable). Those making the decision to license a work (and the terms of the license) may be expected to use the full breadth of choices delegated to them. The concern cautions that this latitude might be used to make choices along political lines. The decision maker could base their choices on personal political beliefs, or on the unspoken (or even spoken) guidelines of superiors. The particular danger arises in the ability to hide the political basis in each decision, which may be masked by other factors in each case.

The other form of discrimination is less dangerous. It involves building political preferences into the licensing policies. Such preferences would not be overtly political; rather, they would collectively benefit favored groups. As an example, a powerful political party may favor "family farmers". It might draft licensing regulations that permit low- or no-cost licenses to use small-plot agriculture guides. Such regulations would be facially neutral: everyone with

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[148] Indeed, such laws may help eliminate political bias. When one political party tried to deny its opponent access to recorded debates of the Indiana Legislature, the state's parallel to the Freedom of Information Act public records forced access. Gellman, *infra* note 218, at n.82.

an interest in farming a thousand acres, or so, would equally benefit from using the guides. Of course, looking at the whole spectrum of users would reveal the preference. Nonetheless, such preferences might be widespread to a degree that diffuses attention.

Another concern views the financial licensing arrangements as another way for political pressures to be subtly introduced. One scholar noted the link between the financial and political concerns:

> To the degree copyright converts politically relevant information into excludable property, it allows the owners of that information to condition access to that information on the receivers' willingness to pay, or perhaps more insidiously, on the receivers' prior political viewpoint.[149]

Most of the political pressures could be applied outright, but would be more likely to appear in licensing. Clear political preferences would be very visible and subject to attack, while a licensing scheme might hide preferential treatment in lower-level discretion. It might also build political party preferences more subtly into licensing factors and policies that appear neutral on the surface, yet reward politically-favored programs of the party in power.

As with the "royalty as burden" concern, the "royalty as politics" concern has merit, but is also likely overstating the danger. Creating a federal government works copyright would necessarily entail creating a licensing scheme broad enough to cover a very large number of works. The stable of royalty-producing works potentially rivals the largest private collections. The largest federal licensing operation imaginable, though, would not begin to approach the truly massive systems of federal employment and federal procurement -- whether in terms of personnel, dollars, or political pressures. And those systems have been very successful in avoiding the taint of "smoky backroom politics" superficially and in daily operations. Success

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[149] Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 Chi.-Kent L. Rev. 675, 689 (1993).

has come through decades of improvements in procedures, checks and balances, and other tools that build an ethical structure. Those improvements could immediately benefit a federal government works licensing program, so that it starts out -- and stays -- free of political influence.

Both of these dangers are possible, but have been generally avoided in other federal government programs.

For example, both delegated authority and built-in preferences could be expected to appear in federal procurement; the federal government purchases hundreds of billions of dollars in goods and services each year -- a large field for discrimination to flourish, if it were going to appear. Yet, the dangers have largely been avoided in this field.[150] Delegated authority has been guided into acceptable channels. "Negotiated procurement" government purchases are an excellent example, as they look beyond simple price to award a contract.[151] The contracting officer may look at other factors, including the past performance of each bidder and their likelihood of completing the contract. Discretion is focused on particular factors. And the award

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[150] The Federal Acquisition Regulation highlights several guiding principals, including that the federal government "conduct business with integrity, fairness, and openness". FAR § 1.102(b)(3). This is carried through the FAR, including extended guidance charging federal employees:

> An essential consideration in every aspect of the System is maintaining the public's trust. Not only must the System have integrity, but the actions of each member of the Team must reflect integrity, fairness, and openness. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly, each member of the Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and openness require open communication among team members, internal and external customers, and the public."

Id. at § 1.102-2(c)(1).

[151] Federal Acquisition Regulation (FAR) Part 15.

decision is followed by a briefing of all of the factors, along with their weighting in the particular decision. Also, the decision may be appealed by any party concerned with the decision.

Federal procurements also exhibit built-in political preferences -- but only after each preference has been properly vetted through the political process. Preferences for small businesses, along with minority- and gender-owned business are all clearly set out in the procurement guidelines.[152] The give-and-take of the political process is presumed to be open, so that all interested parties can participate in meting out the preferences. And if a particular preference comes to be seen as over-reaching, then the political process may be used to correct (or eliminate) the preference.

E. Bureaucratic Efficiency

Introducing copyright protection for federal government works would require a new set of regulations. The Section 105 prohibition should not simply be stricken. Rather, a new system of rules should also be introduced to guide the new rights and responsibilities in federal government works.[153]

Any new government program can be expected to have some attendant costs. New programs impose new regulations that require time and effort to comply with. New systems of

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[152] Current federal procurement practices have explicit preferences made through the political process, such as those listed in FAR § 19.201(a):

> It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

[153] A framework of rules to guide the introduction and continued success is proposed *infra* at § VI.

regulation often also divide rights and responsibilities in new ways, imposing new costs of compliance -- or expenses from litigating and lobbying to change the regulations.

A federal government works copyright can certainly be expected to entail some of each of these costs. Initial litigation and lobbying expenses are assured. Many private firms have vested interests in the current policy of free use of federal government works; indeed, some have their core business model resting on continued free access to their main "raw material".[154] Also, many public interest groups have consistently advocated for the continued free use, and can be expected to oppose any policy that changes that free use to a "fee" use.[155]

The new system would also impose continuing costs. Certainly, there are the explicit costs of licensing the federal government works. Other, somewhat hidden, costs must also be considered. These include the time and effort users will need to spend in determining if a particular work is subject to licensing; if it is, then additional effort will be used in seeking permission to use the work.

These costs -- while new in this context -- have ready analogues in similar programs. The strongest comparison is to the existing copyright system. The proposed protection of federal

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[154] These businesses range from private libraries and media on the "public interest" end of the spectrum to for-profit research banks and firms that specialize in repackaging and reselling government works.

[155] For example, the American Newspaper Publishers' Association voiced its strong opinion against the 1964 bill proposing a limited government copyright. *See* Simon, *supra* note 27, at 432 (discussing the alignment of interest groups involved).

Also, the Software and Information Industry Association -- called "one of the most powerful lobbying organizations in Washington" -- represents over 1,200 publishers, database companies, and other information companies. It has been a powerful voice in Congress, lobbying for the political interests of its members, summed in two primary goals: "to protect their intellectual property rights to the information they sell and to prevent the government from offering on-line information databases to consumers." Anne Wells Branscomb, WHO OWNS INFORMATION? 170 (1994) (discussing the SIIA when it was known as the Information Industry Association).

government works would not create some entirely new legislative creature. It will simply become a small part of the existing copyright system.

Users of currently copyrighted material will simply apply their learned processes to a new source of content. A company that sells access to collected copyrighted newspaper articles already knows how to contact copyright holders and license their works; rather than learning an entirely new process, the company needs only to direct its existing process to a new copyright holder -- the federal government.

Another comparison can be made to the Freedom of Information Act. Critics may see a federal government works copyright at cross-purposes to FOIA -- when such proposals have focused on using the copyright to block access to information. Nonetheless, the FOIA framework provides instructive comparisons. The FOIA framework was far more ambitious, arising to give a unique and comprehensive set of rights to citizens and responsibilities to federal agencies. The creation of the truly novel framework experienced some growing pains and continues to have critics, but can be considered a success -- in particular, providing citizens unparalleled insight into the workings of their government.

A key lesson from FOIA is that a massive -- and new -- system of regulating information can be assimilated in a relatively brief time. While that should not fuel every proposed system of regulation, it does suggest success for the far less transformative protection of federal government works.

The FOIA framework also provides a wealth of efficiency-ensuring tools that can be used in the copyright proposal. The most important mechanism may be the structure of responsibilities within federal agencies. Specific individuals in each agency are responsible for carrying out the requirements of FOIA, including a clear system for citizens to appeal requests

that are denied. Other cost-saving devices should also prove useful -- including strict timetables for responding to requests and the strong backing of the independent judiciary.

F. Avoidance of Improper Incentives

Another concern cautions that federal government copyrights will lure federal agencies and employees from their appointed missions. The central tenet of this concern is a belief that government should focus on the needs of the people, without being driven by business concerns.

The concern arises from the economic benefits that could flow to a federal agency if its works were copyrighted. Opponents of a federal government works copyright argue that the availability of royalties will spur federal agencies and employees to invest their efforts on royalty-generating works -- at the expense of other projects.

The concern is valid at both levels. Individual employees may be drawn toward royalty-generating works, out of either direct self-interest or a sense that it will help their agency (with an indirect benefit to themselves). The direct self-interest could be fueled by a royalty-sharing program, like that used with federally-sourced patents.[156] It could also be removed a step, with royalty-generation counted as a factor in individual performance reports -- leading eventually to promotions and key assignments. Individuals can also be expected to be motivated by assisting their agency earn royalties, whether out of self-interest in sustaining their employer or allegiance to the mission of the agency.

Agencies, if unchecked, can also be expected to direct their energies toward royalty-generating works. In good financial times, the additional revenue could allow the agency to

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[156] *See generally infra* notes 253-263 and accompanying text.

expand its role beyond the dollars appropriated to it by Congress. If budgets are tight, then the royalty income may help the agency keep from shrinking its mission.[157]

Another aspect of improper incentive looks outside of the agency to potential competition with private enterprise. This concern captivated the House of Representatives' Committee on Government Operations when it contemplated policies for public electronic information systems operated by federal agencies:

> [T]he conflict over competition for information services is heightened by electronic information systems. A system that an agency installs to meet its own internal administrative needs can, sometimes with little additional effort or expense, provide others with increased access and data manipulation capabilities. Services that were once not available at all can now be provided by the government. Services that were formerly offered by the private sector at high prices can be offered at low cost by Federal agencies.
>
> One effect of the new capabilities of electronic information systems is that agencies are able to increase activities that compete with private sector information companies. Pressures to generate revenues or to share data may prompt agencies to expand their functions into areas that were previously left exclusively to the private sector or where the boundary lines are less clear.[158]

The House Report grappled with drawing acceptable boundary lines. It mentioned the proposal of the National Commission on Libraries and Information Science (NCLIS):

> The Federal Government should not provide information products and services in commerce except where there are compelling reasons to do so, and then only when it protects the private sector's every opportunity to assume the function(s) commercially.

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[157] As one commentator has noted: "All governments, it seems, are looking for ways to increase public coffers without raising taxes and the exploitation of state-owned intellectual property may appear as the proverbial pot of gold at the end of the rainbow." Sharon K. Sandeen, *Preserving the Public Trust in State-Owned Intellectual Property: A Recommendation for Legislative Action*, 32 McGeorge L. Rev. 385, 400 (Winter 2001).

[158] *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, 99th Cong., 2nd Sess. 23, 53 (1986).

The House Report noted that the key term -- "compelling reasons" -- was left purposefully undefined, as the NCLIS could not agree on universal rules. Instead, the NCLIS opted to propose a four-step process, consisting of:

1) advance notice of agency plans to market an information product or service,
2) independent review within government,
3) preparation of an "information impact and cost analysis", and
4) periodic review of existing government information activities.[159]

The House Report noted the honesty of the NCLIS task force in admitting that it did not have the answer to where to draw the boundary line. The House Report continued by mentioning Office of Management and Budget (OMB) guidance that was equally open-ended:

> Disseminate such information products and services as are:
> (a) Specifically required by law; or
> (b) Necessary for the proper performance of agency functions, provided that the latter do not duplicate similar products or services that are or would otherwise be provided by other government or private sector organizations.[160]

The House Report found that the OMB guidance "raises as many questions as it answers", since the term "specifically required by law" was difficult to determine -- and could be used to terminate any government services even prior to offering if the service "would be" offered by a private firm.[161]

After deciding that no bright line could be drawn, the House Report drew importance from an item that appeared in both recommendations: a federal agency should consider the

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[159] *Id.* (citing page 65 of the NCLIS Task Force report).

[160] *Id.* at 56, citing OMB Circular A-130 at § 8a(9).

[161] *Id.*

potential competitive impact,[162] ensuring that it will meet its obligation to disseminate the data to the public -- while also preserving a role for the private sector.[163]

The concerns of improper incentive can be guarded against. "Mission creep" existed long before the term was invented, with agencies often working to add employees, subject matter coverage and otherwise expand their sphere of influence.

Clear guidelines and strong enforcement have kept unduly ambitious agencies and employees in check. The federal patent royalty process provides a very appropriate example. Licensing proceeds are shared with the source agency and the federal employee-inventor; in decades of experience, agencies and employees have not been drawn from their appointed missions.[164] Those missions can also be continually checked by the agency and through the political process to ensure that the mission does not shift to improperly take value-adding work from the private sector.

V. Policy Arguments for Allowing US Federal Government Copyrights

Many significant reasons support allowing federal government works to be copyrighted.

The case law, legislative history, and legal commentary have overwhelmingly focused on the dangers of such an authorization. That is understandable -- if the solution had to lie at one of the two extremes. The dangers of unchecked copyrighting would outweigh the benefits to be

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[162] *Id.* at 57.

[163] *Id.* at 61.

[164] United States General Accounting Office, *National Laboratories: Are Their R&D Activities Related to Commercial Product Development* (Letter Report published November 25, 1994) (finding that federal laboratories were using the Federal Technology Transfer Act tools -- like CRADAs and royalty sharing -- but were still disseminating most of their research through publications.)

gained. The benefits involve general economic advantages, while the dangers cut to specific core elements of society.

Great room, though, exists in the middle of the two extremes. Critical access to the information that drives a democracy need not be sacrificed at the altar of economics. And, contrastingly, accountability and incentivization do not necessarily rule out a rich public domain for society's creative use.

Unlike many legal issues, the benefits here are not the inverse of the dangers.[165] The current solution approaches the dangers asymetrically, foregoing many benefits in an overbroad protection of the dangers. In more positive terms, the benefits of the current prohibition on federal government copyrights can co-exist with the benefits to be gained by allowing federal government copyrights. Rather than a zero-sum system that simply shifts a line within society, a properly structured copyright system could expand the society.

A. Shepherd the Taxpayers' Resources

An obvious benefit to federal government copyright is bringing in revenue (or offsetting expenses). This was explicitly stated in the case of early state case law reporters. Often, the state's valuable copyright was the key financial device that allowed the opinions to be published at all -- both for use by state offices and individual legal research.[166]

Many federal activities could similarly benefit from such a bartering system.

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[165] The simplest example may be setting a real property boundary. Every square foot gained by one property owner is matched by an equal loss to the owner of the adjacent party.

[166] *See generally supra* note 72.

Simple revenue, of course, can be exchanged for bartering. Currently, many states receive plain payments for their works.[167] Some states direct the income into general coffers, while others guide it back to the revenue-producing activity. Either way, the income offsets tax revenue that would have had to come from the state's taxpayers -- including many who did not use or directly benefit from the information.

The same potential exists at the federal level. Many federal programs already generate income through user fees and outright sales.

For example, visitors to many national parks have paid admission fees for years,[168] and a recent demonstration project brought in an additional $44 million in the first year of its very limited reach.[169]

Looking at another tree in the same forest, timber sales provide an example of revenue generation by outright sales of national resources. In a recent three-year period reviewed by the United States General Accounting Office, timber sales brought in nearly $3 billion of revenue to

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[167] Note that some of these "works" are questionable subject matter for copyright -- particularly items like drivers license information and criminal records. Such factual information would likely run afoul of *Feist Publications Inc. v. Rural Telephone Service Co*, 499 U.S.340 (1991) (rejecting "sweat of the brow" protection of collected facts (telephone listings in white pages), finding copyright extends only to the selection, coordination, and arrangement of the facts, if those elements are creative enough to qualify for copyright protection); see, though, the reclamation of data protection under *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (allowing the protection of factual data under a "shrinkwrap" license, relying on contract law over copyright law).

[168] The Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897 (1964), capped admission fees for most NPS parks at $5 per car. Even under that system, the NPS raised $77 million in 1996 (the last year of that program).

[169] The NPS claimed it was "beset by financial difficulties brought about by increasing levels of visitation, unfunded infrastructure repair, and rising operating costs" and Congress authorized an expanded user fee demonstration project in the Omnibus Consolidated Rescissions and Appropriations Act of 1996. The demonstration project involved only 100 parks, yet increased NPS user fees by roughly 60% (from $77 million in 1996 to $122 million in 1997).

the national Forest Service.[170] The Forest Service directed $2.7 billion of the revenue to its mandated projects (ie., reforestation, brush removal, and erosion control), and transferred the remaining $300 million to the Department of the Treasury.

Estimates of possible federal copyright revenues are difficult to predict. Some guidance, though, can be found in the experience of several related projects. One country's experience is instructive: Canada receives over $3 billion each year from licensing its government works.[171]

Some domestic examples are also available. The Department of Education sponsored a database of articles for educators; the database was operated through a contractor -- with explicitly contracted authority to collect fees from users of the database. The database cost $7 million a year to operate, and collected $4 million a year in usage fees. While not creating a "profit" for the federal department, the revenue does give an example of an offsetting return that minimizes the cost of a federal mission.[172] (And applying that 57% offset to the annual $78 billion federal research and development investment yields $43 billion in minimizing revenue, without even beginning to consider the many works created outside of the rigorously-defined R&D budget.)[173]

Domestic federal patent royalties also give some analogous experience. Under the federal policy of encouraging federal patents, federal agencies can receive revenue from

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[170] United States General Accounting Office, *Forest Service: Distribution of Timber Sales Receipts Fiscal Years 1992-94* (September 1995).

[171] Treasury Board of Canada Secretariat, *Information Management - A Primer on Databases for Managers* (available at http://www.tbs-sct.gc.ca/pubs_pol/ciopubs/tb_oimp/priwp-2_e.html).

[172] The database -- termed ERIC for "Educational Resources Informational Center" -- is described in detail in Gellman, *supra* note 218, at 1052.

[173] National Science Foundation: Division of Science Resources Statistics, *Survey of Federal Funds for Research and Development: Fiscal Years 2000, 2001, and 2002*, at Table C-2 (estimating total federal funds outlay for research and development in 2002 at $78,334,900,000).

licensing fees.[174] Taking one agency as an example, the National Institutes of Health received $102 million in such fees from 1996 to 1998.[175]

Possible comparisons might also be drawn from large copyright managers in the private-sector. Software companies provide an excellent example, with the majority of their revenue based on copyrighted works in the form of computer programs. The comparison is strengthened by the vast number of computer programs created by the federal government. The federal government is involved in almost every aspect of commercial life, including property management, health care, transportation, and financial administration. Like private-sector firms, federal agencies use computer programs to assist in these massive management tasks. These and other federal government missions often involve other computer programs, including computer-based training for military members and expert systems for agricultural use (to name two very disparate examples.)

Direct commercial valuation is difficult, as federal government software rarely competes directly with commercial software. If a commercial program will fulfill the requirement, then purchase is preferred over programming.

Still, the many missions of the federal government create many computer programs with commercial potential. Valuations, while vague, are large. One congressional witness -- then the Register of Copyrights -- testified that the software and related data had an immense value.[176]

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[174] *See supra* notes 98-108 and accompanying text.

[175] United States General Accounting Office, *Technology Transfer: Number and Characteristics of Inventions Licensed by Six Federal Agencies* (Letter Report published June 18, 1999).

[176] *Legislation: House Panel Considers Copyright Protection for Federal Software*, 40 Pat. Trademark & Copyright J. (BNA) 6, 7 (May 3, 1990) (citing testimony of Register of Copyrights Ralph Oman, who also noted that Section 105's grounding in open government may not be feasible when government works have great commercial potential).

Another witness estimated that the United States had lost billions of dollars by not protecting its software.[177]

So, while revenues from a federal works copyright cannot be estimated with much precision, it is clear that there is great value in federal works. The taxpayers' investment has yielded a national resource with sure potential.

B. Link Costs with Benefits

These revenue raising programs and others have met with resistance. But users expect the costs that come with the benefits they seek in the private sector, and have come to understand the same relationship when using public resources.

Raising revenue can be more than a benefit in itself. Properly structured, the revenue is raised by linking the users' costs to the value they receive. This linkage reflects a basic tenet of our capitalistic system -- and it carries two of the basic benefits of that system.

The first benefit of linkage is fairness to the taxpayer. Those who benefit from a public resource help directly support that resource. While this lightens the general tax burden, it does so in a way that shifts the particular tax away from the taxpayers who do not chose to benefit from the resource.

Granted, many public goods are shared by all and defy separate fees. Sometimes the difficulty is in identifying a particular usage, while other times the good suffers from the closely related "free rider" difficulty.

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[177] *See Legislation: House Panel Witnesses Endorse Copyright for Government Software*, supra note 139, at 292 (citing testimony of law professor James Chandler, who also noted that the utilitarian nature and commercial impact of software reduce the First Amendment concerns of the Section 105 prohibition).

The general public good of "national defense" is a traditional example. The benefit is too diverse and distant to allocate individual costs based on "use". Similarly, an individual benefits to the same degree whether they contribute or not. The nature of national defense requires setting a general level of protection for the entire society, with the benefit to all being funded from a tax on all.

Copyrighted works, however, present an entirely different category of public good: uses are discretely measurable and optional. Far from a broad, shared benefit like national defense, a copyrighted work must be fixed in a "tangible medium of expression";[178] this quality naturally supports measurement -- whether the good is in an "old fashioned" physical embodiment like a book, or contained in a new digital form like a computer file.[179]

(Certain small subsets of copyrightable subject matter defy measurement. For example, individual viewings of large sculpture on public display in a park do not lend themselves to easy metering.[180] Likewise, materials in a public library are often open to browsing without individual uses being recorded.[181])

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[178] 17 U.S.C. § 102(a).

[179] Indeed, the shift to digital containers and delivery systems can make measurement even easier. Specifically, individual uses can monitored and metered; this is a remarkable change from physical containers, which were suited for measuring sales, but not post-sale uses. The change is controversial on several levels. Tom W. Bell, *Fair Use Vs. Fared Use: The Impact Of Automated Rights Management On Copyright's Fair Use Doctrine*, 76 N.C.L. Rev. 557 (January 1998) (generally welcoming the new ability of copyright owners to micro-manage use on an unprecedented scale); *compare with* the philosophy of noted "electronic frontier" spokesman John Perry Barlow, ie., http://www.theatlantic.com/unbound/forum/copyright/barlow1.htm (posted on September 10, 1998; last visited March 1, 2002).

[180] Note, though, that this is an issue of practicality rather than legality. The right to "display the copyrighted work publicly" is one of the bundle of rights of the owner of the copyright in the sculpture. 17 U.S.C. § 106(5).

[181] *See* Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997) (holding that while generally a "library may lend an authorized copy of a book that it

The other benefit of linkage splits into market guidance on the creation and use of works. Creating works based on market value -- of great importance to private authors -- should be of little importance to the federal government as author. Indeed, it is a concern to be wary of in government works.

Market guidance on the use of works, though, can be of some benefit in a government works regime. Placing some cost on a work brings some balance to the benefit; users must give some attention to the use, aside from simply asking for it. In economic terms, a valuable good available at no cost leads to demand that outstrips supply. The supply curve, of course, can be far flatter for intellectual property, compared with physical items. The marginal cost of delivering an additional copy of a computer file is often much lower than the producing a copy of a physical product. This benefit -- minor to begin with -- may "wash", with the savings from reducing unnecessary deliveries being offset by the lost benefit of uses that would have grown beyond initial expectations.

C. Clarify Subsidies

Permitting federal government works to be copyrighted would provide another closely related benefit: it would clarify subsidies. Many industries currently benefit from the free use of government works. And they might continue to receive free use under a federal government works copyright regime -- but that use would be measured and debated before being provided for in the legislation.

The federal government subsidizes many activities. Those subsidies are visible to the public. Farm subsidies are a common example, with over $20 billion per year in direct subsidy

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lawfully owns without violating the copyright laws", a library violated copyright by having an unauthorized copy open to public viewing -- even though no record was made of any public

payments to farmers.[182] The subsidies are clearly outlined in general terms in the legislation, as well as specifically listed by recipient.[183]

The information serves the immediate purpose of alerting the public to a use of their resources. Beyond that simple alert, the information provides a level for the public to gauge its support of the subsidized activity. And that knowledge can drive the deliberation that underpins democracy. The farm subsidy information has prompted policy-based studies, editorials, and much debate between the people of the country and their elected representatives.

Right now, the public does not have even the basic information on its investment in copyright-worthy works.

Enabling the federal government to claim copyright in its works is the vital first step to truly valuing those works. The true value of the works -- whether licensed for a fee or for free to private firms -- is tangible data that creates the record of who benefits from the public investment. The public can then decide the direction and degree of subsidy to permit in the future.

D. Bring Transparency to Government Processes

Another benefit expands on the benefit of attaching values to subsidies. The clarity gained in that benefit would become visible in other government processes. Those processes would likewise become open to the natural benefits of transparent government. An informed

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view).

[182] John Lancaster, *More Subsidy Money Going to Fewer Farms*, WASHINGTON POST, January 24, 2002, at A01.

[183] The Environmental Working Group, for example, hosts a fully-searchable database on its website. http://www.ewg.org/ (last visited February 15, 2002). The database, it should be noted, consists of federal government records obtained through a Freedom of Information Act request.

electorate, full discussion on key points, and accountability in practice are preferable to the current system.

Currently, the many benefits of copyright protection have driven some federal actors to circumvent the prohibition of Section 105. The prohibition -- while very clear and very broad -- has still been subjected to attempted circumvention through several methods.

1. Refusing to Release Data

Government works are generally accessed through two methods. The first -- government publication -- presents no issue here; a federal government actor has taken steps to open the work to the public, through physical distribution or, increasingly, through digital delivery via web sites.

The issue of refusal grows out of the other method of access: a direct request from a private party to the federal government through the Freedom of Information Act (FOIA).[184] The FOIA has an extremely broad application; the Supreme Court commented that "[a]s the Act is structured, virtually every document generated by an agency is available to the public in one form or another ...."[185] Indeed, FOIA superceded the public disclosure section of the Administrative Procedure Act,[186] which the Supreme Court (among other commentators) noted "was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute."[187]

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[184] 5 U.S.C. § 552.

[185] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

[186] 5 U.S.C. § 1002 (1964 ed.).

[187] *Mink*, 410 U.S. at 79.

Even against this broad backdrop of full disclosure, federal agencies have attempted to use the narrow FOIA exclusions to refuse releasing their works. Many of these refusals exhibit a desire to "protect" the work consistent with copyright.

One exclusion seeks to protect "predecisional" documents.[188] This narrow protection is meant to carve out room for deliberation. The business of government necessarily involves many actors, each of whom benefits from the transparency of government actions -- whether in favor of their interests or opposed. The exception creates an area of deliberation, so that government actors can deliberate without their consideration being immediately available to interested parties.

Some federal government actors have sought to stretch this protection to protect their works far beyond a reasonable period of "deliberation". A typical example is found in *Petroleum Information Corporation v. United States Department of Interior.*[189]

The federal actor in that case was the Department of Interior's Bureau of Land Management. The Bureau was consolidating information on public lands from its printed records and its decentralized computer databases. While in the process of creating the single centralized computer database, the Bureau received a FOIA request from the Petroleum Information Corporation. The requestor -- a compiler and reseller of oil and gas exploration data -- sought the release of the information in computer-readable form.

The Bureau denied Petroleum Information's FOIA request. The denial was based on the deliberative process privilege exception of FOIA, with the Bureau unwilling to release any information while the centralized database was still being compiled.

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[188] 5 U.S.C. § 552(b)(5) (2002).

[189] 976 F.2d 1429 (D.C. Cir. 1992).

The Bureau's denial was struck down at summary judgment,[190] and the decision of the district court was affirmed by the appellate court. The district court stressed the nature of the work as "purely factual" and "neither predecisional nor deliberative",[191] and cited a test from another predecisional case: "many [predecisional exemption] disputes may be decided 'by application of the simple test that factual material must be disclosed but advisory material, containing opinions and recommendations, may be withheld.'"[192]

The appellate court cautioned against such a "reflexive fact/opinion" test. It fleshed out this dichotomy by noting that factual material could be withheld in certain cases: "'the disclosure of even purely factual material may so expose the deliberative process within an agency' that the material is appropriately held privileged."[193] Nonetheless, the court found that the Bureau's database lacked the deliberative connection; while the database was not yet final, the remaining work was very straightforward and not related to future policy-oriented decisions of the agency.

Other cases highlight the potential of the exception to successfully deny or delay the release of federal government works. The Department of the Air Force was held to have properly used the deliberative process privilege to deny FOIA requests for drafts of military histories.[194] The drafts passed through several levels of editorial review; release of early drafts

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[190] No. 89-3173, slip op. (D.D.C. Dec. 20, 1990).

[191] *Id.* at 5.

[192] *Id.* at 7 (citing Mead Data Central, Inc. v. U.S. Department of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977)).

[193] *Petroleum Information*, 976 F.2d. at 1434 (citing *Mead Data,* 566 F.2d at 256)

[194] *See* Russell v. Department Of The Air Force, 682 F.2d 1045 (D.C. Cir. 1982) (finding deliberative agency function in Office of Air Force History editorial review process used to prepare historical document on use of Agent Orange during Vietnam war) *and* Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565 (D.C. Cir. 1987) (finding that "Disclosure of editorial judgments - for example, decisions to insert or delete material or to

would allow a comparison with the final manuscript, and that comparison would reveal the deliberative process employed in reaching the resulting work.[195]

Similarly, the Environmental Protection Agency was allowed to withhold a staffer's summary of evidence; the possible comparison of the summary against the body of evidence would have revealed the agency's "judgmental process" in characterizing the evidence.[196]

An important key in these cases is the long-term nature of the refusal to disclose. Many uses of the deliberative process privilege exception simply delay disclosure, but the cases discussed above have the potential of a perpetual denial -- paradoxically far longer than the current duration of copyright!

2. Licensing and Royalties

The broad disclosure principles of FOIA and the basic prohibition on copyright in federal government works would seem to present a doubly strong barrier to a federal agency's licensing of its works. Nonetheless, such licensing has been attempted -- and has withstood challenge in court in some cases.

The prototypical case of such licensing is *SDC Development Corp. v. Mathews*.[197] The federal agency in *SDC* was the National Library of Medicine (Library). The library was established by Congress to "assist the advancement of medical and related sciences, and to aid the dissemination and exchange of scientific and other information important to the progress of

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change a draft's focus or emphasis - would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work." at 1569).

[195] *Russell*, 682 F.2d at 1049 *and Dudman*, 815 F.2d at 1569.

[196] Montrose Chemical Corp. v. Train, 491 F.2d 63, 68 (D.C. Cir. 1974).

[197] 542 F.2d 1116 (9th Cir. 1976)

medicine and to the public health".[198] Congress supplemented these general goals by specifically mandating the library to "acquire and preserve medical publications, index and catalogue the materials, make the indexes and catalogues available to the public, and provide such other research assistance as furthers the purposes of the statute."[199] The statute that created the Library authorized charging the public for use of the materials and services offered by the library.[200]

The Library created a computerized database of citations and abstracts of two million medical research articles. It called this database MEDLARS.[201] The library offered public access to the MEDLARS database through two methods -- both at a cost; users could access the data through a computer terminal at an hourly fee of $15, or they could purchase the entire database on computer tapes for $50,000.

The charges were imposed with the purpose of recovering part of the $10 million investment the library had made in creating the computer database.[202] In keeping with this purpose, the library had used the full set of tapes to barter with other organizations for their assistance in keeping the database current.[203]

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[198] 42 U.S.C. § 275.

[199] *SDC*, 542 F.2d at 1117 (interpreting 42 U.S.C. § 276).

[200] 42 U.S.C. § 276(c)(2).

[201] "MEDLARS" is the shortened form of "Medical Literature Analysis and Retrieval System". *SDC*, 542 F.2d at 1117.

[202] *SDC*, 542 F.2d at 1118.

[203] *Id.* (noting that no one had paid the $50,000 charge for the full set of database tapes, while organizations had bartered their assistance in exchange for tape sets.)

SDC -- wanting neither to pay for the database nor assist in its upkeep -- chose to try a third route to obtain the set of tapes: it made a request under FOIA, enclosing the $500 it estimated would cover the cost of duplicating the tapes.

The Court of Appeals for the Ninth Circuit found that the library did not need to release the database under the Freedom of Information Act. The court summed SDC's argument into a "simple syllogism":

> The Freedom of Information Act requires reproduction, at nominal cost, of all agency records not falling within one of the listed exemptions. The MEDLARS tapes are agency records, not specifically exempted. Therefore, the MEDLARS tapes must be reproduced at nominal cost upon appellant's request.

The court reached a different conclusion, however, by faulting the premise that the tapes were "agency records". The term was not explicitly defined in the Freedom of Information Act, and the court found the legislative history centered on records that "were primarily those which dealt with the structure, operation, and decision-making procedure of the various governmental agencies."[204]

Finding FOIA's focus to be the process of government, the court excluded the MEDLARS database as the result of the agency's processes -- and, as such, not an "agency record" that had to be released under FOIA. The court was also comforted by the fact that the

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[204] *Id.* at 1119. The court was greatly persuaded by remarks in the Senate and House reports on the predecessor to the Freedom of Information Act (the 1966 revision of section 3 of the Administrative Procedure Act). The Senate Report stated that the purpose of broad public access was grounded in the ideal that "the public as a whole has a right to know what its Government is doing." *citing* S. Rep. No. 813, 89th Cong. 1st Sess. 5 (1965). The House Report similarly centered on the need to illuminate internal processes: "The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government." *citing* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966).

Library made the information available through its own system -- evidence that it was "not seeking to mask its processes or functions from public scrutiny."[205]

After finding that the Library did not need to release the database under FOIA, the court turns to supporting the Library's system of charging for its works. The court's support is couched in copyright-like terms. It found the MEDLARS database to be the Library's "stock in trade"[206] and a "highly valuable commodity".[207] And the court projected the value into the logical business transaction of licensing:

> Requiring the agency to make its delivery system available to the appellants at nominal charge would not enhance the information gathering and dissemination function of the agency, but rather would hamper it substantially. Contractual relationships with various organizations, designed to increase the agency's ability to acquire and catalog medical information, would be destroyed if the tapes could be obtained essentially for free. It is also likely that the current charge system for MEDLINE, as well as various publications of the National Library, would be adversely affected.[208]

This logic was applied in other cases to allow federal government actors to "protect" works. A typical example involved a FOIA request for a video teleconferencing program for desktop computers, along with information related to the program; the requester planned to distribute the program over the Internet.[209]

The requested information was held to not be an "agency record" for FOIA's purpose, and therefore could not be obtained through FOIA. The court examined the relationship between the program's creator (Sandia National Labs) and the federal agency that received the FOIA request

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[205] *Id.* at 1120.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] Gilmore v. United States DOE, 4 F. Supp. 2d 912 (N.D. Cal. 1998).

(Department of Energy); after finding that even if the creator was a federal agency, the program was not a "record" under *SDC*'s analysis.[210]

In another case, a private attorney was denied a copy of a computerized legal information database compiled by the United States Air Force.[211] The database -- like MEDLARS -- was held to not be an "agency record" under FOIA; in a further similarity, the court was also concerned with the economic impact of releasing of the information at the nominal FOIA cost:

> The "FLITE" computer system, a portion of which plaintiff is seeking, is a collection of legal databases acquired in part through data exchanges with other agencies and private publishers. [* * *] The Air Force continues to rely on such exchanges, which would be rendered impossible if plaintiff's request were granted because the commercial value of the computerized data would be lost.[212]

The compilation at issue -- a collection of U.S. Supreme Court opinions -- would be questionable subject matter for a copyright. In denying federal agencies copyright protection, those agencies sought alternatives and found one "stronger" than copyright -- in both duration (potentially perpetual) and subject matter scope!

3. Restricting Release / Agreeing to Restrict

Federal agencies also employ use restrictions to create copyright-like controls over their works. The restrictions generally come in the form of a license; while often royalty-free,[213] the license imposes limitations on the way the recipient can use the federal work.

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[210] *Id.* at 921. The court also found an alternate reason to deny release. If the requested program was determined to be an agency record, then it would fall under the confidential record exemption of 5 U.S.C. § 552(b)(4) to protect the author from competitive injury. Id. at 922.

[211] Baizer v. United States Dep't of the Air Force, 887 F. Supp. 225 (N.D. Cal. 1995).

[212] *Id.* at 229.

[213] For discussion of royalty-based licenses, *see supra* § V(D)(2).

The core limitation restricts re-release of the work. This over-arching restriction very effectively keeps control over the work with the federal actor. It allows the user to learn from the work, but that knowledge must stay with the user under the license. The user must gain the agency's further permission to publish or otherwise share the work. In this way, the federal agency remains the main source for the work, with only "approved" outside versions or sources.

This mechanism is nicely illustrated in an arrangement employed by the United States Supreme Court. Oral arguments in front of the Court have been recorded onto audio tape since 1955. In 1969, the Court began depositing the recordings with the National Archives and Records Administration. The National Archives allowed public access to the tapes under an agreement with the Court.[214]

The agreement treated the tape recordings quite differently from written transcripts of the oral arguments. The transcripts were freely available to the public, with no restrictions on use (including copying the transcripts).[215] The audio tapes, though, were heavily restricted under the agreement.

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[214] *Guide to Federal Records in the National Archives of the United States*, Section 267: Records of the Supreme Court of the United States, (1995).

[215] The Court's policy of free access to transcripts of oral arguments raises an interesting collateral issue: the rights of the advocates arguing before the Court. As with the general issue of copyright in U.S. government works, copyright in legal briefs and arguments may similarly be a "settled" issue worthy of serious analysis. Certainly, a strong argument can be made that the works are copyrightable subject matter on their own -- literary, scientific, or artistic expressions fixed in a tangible form. At present, though, they seem much like the model building codes of *Building Officials* and *Veeck* (discussed *supra* at notes 28-34 and accompanying text). Copyrightable if contained in a book on sample briefs or a training film on oral advocacy, presenting the works in court apparently converts them into law -- stripping them of copyright protection as they become "facts".

As with other government works, the Berne Convention and TRIPS, through incorporation, explicitly leave the issue to individual nations to decide. Berne Convention, art. 2bis(1).

The agreement restricted the National Archives' use of the recordings. The National Archives agreed that it "may not reproduce and furnish any audiotapes, or broadcast any audiotape by means of radio, television, or other similar medium, for any commercial purposes without first obtaining approval of the Marshal of the Court."[216]

The agreement also restricted the manner in which the National Archives could grant public access to the records. Basic access to the recordings required a "written statement from the requestor detailing the purpose or purposes for which the requestor wishes to use the audio tape." This written statement was reviewed by the National Archives; requests with any "commercial purpose" were forwarded to the Marshal of the Court for approval.[217]

If access was granted, then the requestor had to sign an agreement that governed her use of the recordings. The user agreement was mandated by the agreement between the Court and the National Archives and carried forward the restrictions on use imposed by the Court on the National Archives. Specifically, the user could not reproduce any portion of the recording for any reason. Also, the user agreed to use the audiotapes only for private research and teaching, which explicitly excluded broadcast of any portion of the recording.

The issue may well come to the fore in the related protection of patent law, which is quickly encroaching on the "liberal professions", including law. *See* John R. Thomas, *The Post-Industrial Patent System*, 10 Fordham Intell. Prop. Media & Ent. L.J. 3 (Fall 1999). If copyrighting a particular expression of a legal argument violates due process, the much stronger and broader protection of patent law will raise even greater concerns.

[216] *Id.* at § 267.3.1.D.

[217] *Id.* at § 267.3.1.B.

The Supreme Court lifted the restrictions in 1993. It did so with no comment on why the they had been imposed or why they had been lifted, save the simple statement that the restrictions "no longer served the Court".[218]

The sudden change, though, was very likely driven by the unauthorized commercial release of many of the recordings. The recordings were released by Peter Irons, a professor of constitutional law at the University of California at San Diego, with a book of transcripts and commentary. The collection -- "May It Please the Court"[219] -- was published and sold through traditional book channels. It quickly sold through its initial printing of 20,000 editions at seventy-five dollars each.[220]

Professor Irons obtained the tapes through the standard process. He submitted the required request for access to the tapes, although he did not mention his intent to publish the recordings. His generic request was granted and he signed the required agreement restricting his use to private research.

Professor Irons admittedly then diregarded the agreement: "I signed the agreement and yes, I did violate it."[221] He continued, defending his actions: "But of course the agreement itself is a violation of the First Amendment. If you don't sign it, you don't get the tapes."[222]

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[218] Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-like Controls over Government Information*, 45 Syracuse L. Rev. 999, 1059 (1995) (citing a 1993 letter from the Marshal of the Supreme Court of the United States (Alfred Wong) to the Acting Archivist of the United States (Trudy Peterson)) (

[219] Peter Irons & Stephanie Guitton, *May It Please the Court: Transcripts of 23 Live Recordings of Landmark Cases As Argued Before the Supreme Court* (1993).

[220] Sarah Lyall, *Book Notes*, N.Y. TIMES, Sept. 8, 1993, at C16.

[221] *Id.*

[222] *Id.*

The justices were disturbed by the unauthorized release of the recordings. They considered taking action against Professor Irons, ranging from issuing a strong public admonition to suing him based upon the terms of the agreement he had signed.[223] Instead of these options, though, the Court lifted the restrictions on the audio tapes for all users. While the Court declined to explain its decision, one commentator has opined that the Court may have wanted to avoid losing a battle in either the courtroom or the public eye:

> It may be that when the Court was faced with the option of trying to enforce the restrictions in a public proceeding, it determined that the policy was unenforceable for legal, public relations, or other reasons.[224]

Special circumstances allowed the Supreme Court to create and perpetuate its restrictive arrangement. First, the judicial branch is exempt from the Freedom of Information Act; courts -- up to and including the Supreme Court -- are not required to release information to the public. This gave the Court great latitude in fashioning the terms of any release it wished to make.[225] NARA's policy of being a custodial conduit was the other enabling component of the arrangement. It agreed to the Court's restrictions and enforced those restrictions on users seeking access to the recordings.

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[223] Joan Biskupic, *Supreme Court May Sue Over Release of Its Oral Arguments*, CHICAGO SUN-TIMES, August 30, 1993, at 40 (quoting Toni House, the Court's public information officer).

[224] Gellman, *supra* note 218, at 1059.

[225] The Supreme Court continues to decide the terms of releasing its work. For example, transcripts are currently offered through a bifurcated system. It has contracted with one company for all transcription; that single source offers "same day" copies of the transcripts for a fee of five dollars per page, while it gives copies to be posted on the Supreme Court's website ten to fifteen days after the transcripts are complete. Recordings of oral arguments may only be made by personnel specifically authorized by the Marshal of the Court to make and maintain official recordings. The recordings are kept with the Marshal of the Court until the end of the term, then transferred to the National Archives -- where they may now explicitly be copied by the public with no restrictions on further use. See *Transcripts and Recordings of Oral Arguments* (October 2001), available at http://www.supremecourtus.gov/oral_arguments/oral_arguments.html

Other agencies have attempted similar arrangements.

The Federal Law Enforcement Training Center, for example, sought to restrict the release of its works. The FLETC created training videos on investigative techniques and criminal law topics. Its distribution system was designed with the goal of containing the videos within the law enforcement community.

This goal was effected through an agreement that the purchaser was required to sign. The agreement took the form of a 'letter of indemnification" that had several specific restrictions backed by a very broad indemnification clause.

The specific restrictions were much like those imposed by the Supreme Court on the use of its oral argument recordings. The restrictions mesh to limit use of the training videos to the law enforcement community -- and also to greatly limit each purchaser's use:

> 1. Sale is limited to United States law enforcement officials only.
> 2. FLETC programs cannot be duplicated in whole or in part.
> 3. FLETC programs can only be used by and shown to other law enforcement officials in the United States.
> 4. FLETC programs cannot be broadcast in whole or part in any type of system.[226]

The first restriction limits the initial sale to the intended law enforcement community. The third restriction keeps the work within that target audience. The second and fourth restrictions work to keep the FLETC as the sole source of the training videos, with purchasers unable to make copies to give to others or broadcast the programs to a wider audience.

These tightly-drawn restrictions are supported by an over-arching indemnification clause:

> We hereby agree to indemnify, save, and hold you, the United States Government, its agencies, officers and/or employees harmless from and against all liability, including costs and expenses, based on the violation of rights of ownership, infringement of

[226] Gellman, *supra* note 218, at 1049 (quoting FLETC indemnification letter).

> copyright, or invasion of the rights of privacy, resulting from our use of such film and/or footage pursuant hereto.[227]

This language burdens the purchaser with great potential liability. The liability exists with any use of the training videos, but rises significantly with a use outside of the law enforcement community. Such a use is likely to move outside of the natural sphere of sovereign immunity protection, particularly with the use going beyond the specific restrictions in the agreement.

The highly restrictive distribution system was supported on two grounds. First, release of the works to the general public might allow unintended viewers to circumvent investigative techniques taught in the videos,[228] and possibly put law enforcement officers in physical danger.[229] These (and other release exemptions) are discussed at greater length in this paper.[230]

The other supporting leg was based on compensation. While disclaiming any copyright in the training videos, the FLETC director went on to focus on the investment the Center had in its works:

> The videos are produced as training tools. In order to ensure the full benefit of the investment through distribution to law enforcement agencies while at the same time protecting the information from those who may use the information to circumvent the law, the restricted distribution system was devised.[231]

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[227] *Id.*

[228] 5 U.S.C. § 552(b)(7)(E) (exempting release under FOIA of information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law").

[229] 5 U.S.C. § 552(b)(7)(F) (exempting release under FOIA of information that "could reasonably be expected to endanger the life or physical safety of any individual").

[230] *See supra* notes 113-120 and accompanying text.

[231] Gellman, *supra* note 218, at 1050 (quoting a letter from Charles Rinkevich, FLETC Director, responding to Congressional questioning).

The FLETC shelved this system, though, when it was challenged. The challenge came from the Chairman of the Subcommittee on Information, Justice, Transportation, and Agriculture.[232] Once challenged, the Center withdrew a half-dozen films from distribution[233] and removed all restrictions on the other films.

The efforts show a strong desire for copyright-like control. Whether "successful" for a long period (as with the Supreme Court recordings) or a briefer time (as with the FLETC training videos), the restriction systems take effort to work around the Section 105 prohibition. This effort does not lead to certain success, either, costing additional effort in supporting and defending a particular arrangement.

This uncertainty and inefficiency would disappear if federal agencies could copyright their works. Agencies would have a sure system with set spheres of protection, and users would have a known process to obtain and use the information they sought. Offering one clear route should provide a strong incentive to federal agencies seeking protection; the new "carrot", though, should be backed by a strong "stick" -- penalizing agencies that continue attempting circumvention by refusing to release works, or releasing them only under alternative licensing and access restrictions.

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[232] The chairman was Representative Gary Condit and the subcommittee falls under the House Committee on Government Operations.

[233] The six films were withheld to prevent circumvention of the law. *See supra* notes 228 and *supra* notes 113-120 and accompanying text.

While the training videos certainly fit within the exemption, one commentator noted that exempt information may be deleted -- but that FOIA requires the release of "any reasonably segregable portion of a record". Gellman, *supra* note 218, at 1051 (citing 5 U.S.C. § 552(b)) That same section also requires notice of the amount of information deleted (unless the amount itself would also harm an exempted interest).

E. Enable Cooperative Research

Allowing the federal government to secure copyright protection would settle the controversy surrounding public-private ventures. That certainty should logically spur more cooperation, with private companies able to clearly protect their contributions from lapsing into the public domain. The increased participation should also come at a lower cost, as private companies would be able to separately market their copyrighted works -- rather than look to federal funds for all costs and profits.

Currently, private contractors working on federally-funded projects face the prospect of losing copyright protection for their works. Contractors' works can be "tainted" through contributions by federal employees.

An example of this was raised in congressional testimony.[234] The House Subcommittee on Science, Research and Technology heard from the president of a software contractor that developed several computer programs jointly with the United States Navy.[235] When the contractor moved to market the programs in the commercial sector, the Office of Naval Research took the stance that the programs could not be copyrighted. The assistance of naval personnel placed the completed works into the public domain (unless that federal assistance could be discretely isolated). Without copyright protection, the contractor could not commercialize the completed programs.[236]

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[234] *See Legislation: House Panel Considers Copyright Protection for Federal Software, supra* note 176.

[235] *Id.* at 7.

[236] The assumption of profitability is based on the traditional commercial software model. Certainly, other marketing models exist. The Open Source movement is a highly successful example, with companies profitably marketing, modifying, and supporting software that is explicitly licensed as free to distribute and use. *See generally* Shawn W. Potter, *Opening Up to Open Source*, 6 Rich. J.L. & Tech. 24 (Spring 2000).

Contracted works can also be imputed to the federal actor that funds the effort. This threat exists even if no federal employees assisted in creating the work. While the issue is not explicitly addressed in the statute, it is discussed in the legislative history:

> There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld.[237]

This discussion raises the issue, but does not settle it.[238] Indeed, it introduces uncertainty by leaving undefined the key term "merely as an alternative". This uncertainty has been addressed in two judicial opinions.

The first case -- *Schnapper v. Foley*[239] -- centered on a set of films commissioned to celebrate the United States bicentennial anniversary. The films depicted early constitutional law cases,[240] with the goal of increasing public understanding of key constitutional law principles. The Administrative Office of the United States Courts (AO) awarded the half-million dollar production contract to Metropolitan Pittsburgh Public Broadcasting, Inc. The films were made, then broadcast over the Public Broadcasting System. A private publisher requested permission from the contractor to print the text of the films. The contractor refused.

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[237] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 59 (1976).

[238] This continued a history of uncertainty. Under the Copyright Act of 1909, the Copyright Office registered works created by federal contract. The Copyright Act of 1909, though, was meant to mesh with the Printing Law of 1895, *supra* note 5, which prohibited copyrighting "every publication authorized by Congress in all possible forms".

[239] 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982).

[240] The cases dramatized in the "Equal Justice Under Law" film series were: Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824); and the trial of Aaron Burr.

The private publisher brought suit against the contractor, PBS, and the AO. The suit sought injunctive relief, requesting that the contractor's copyright be invalidated and that the copyrighting of all future commissioned works be enjoined. The plaintiff advanced the theory that allowing protection for commissioned works subverted the public policy prohibition on copyrighting federal works. It reasoned that funding the work through a contractor that could copyright the work, then allowing the federal actor to guide the contractor's actions through an agreement amounted to giving the federal actor prohibited copyright protection.

The court disagreed, finding no explicit prohibition on contractors retaining copyright in their federally-funded works. The decision was based on a very literal reading of the Copyright Act of 1976. Section 105's prohibition of copyright in any "work of the United States Government", was limited by the Section 101 definition of that term:

> The statute defines a "work of the United States" as one "prepared by ... an employee of the United States Government as part of that person's official duties." It is readily observable, therefore, that the language of the new Copyright Act does not prohibit copyright protection for federally commissioned works.[241]

The court did, though, leave open some possibility: "Had the Government employees been detailed as consultants or employees of WQED, we might more readily find the purported assignment to be a 'subterfuge,' but without any such allegation we simply lack the statutory warrant to void the assignment."[242]

The other, more recent case, comes even closer to the line set out in *Schnapper*. In *United States v. Washington Mint, L.L.C.*,[243] the federal government successfully enforced copyright protection of the Sacagawea dollar design. As with the films in *Schnapper*, the dollar

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[241] *Schnapper*, 667 F.2d at 108.

[242] *Id.* at 109.

[243] 115 F. Supp. 2d 1089 (D. Minn. 2000).

design was created outside of the federal agency. In this case, the design was submitted by a private artist and selected in a source-blind judging process that included entries from other private artists and from government employees. Participating private artists were required to assign all rights in their designs to the government, and the government protected those rights by bringing the infringement action against the maker of a three-inch gold replica of the Sacagawea dollar.

The defendant countered with a Section 105-based argument similar to that seen in *Schnapper*. The federal actor could not hold the copyright to the coin design, it reasoned, and therefore could not bring a copyright infringement action.

Realizing that *Schnapper* had allowed the copyright of federally-commissioned works, the *Washington Mint* defendant sought to distinguish its case. It did so by highlighting the difference in available government talent. In *Schnapper*, no one argued that the Administrative Office of the United States Courts could have produced the films; it was natural to commission the works from talent outside of the federal agency. In *Washington Mint*, though, the United States Mint had an existing staff of coin designers employed by the federal government. The defendant assumed that the use of an outside designer was "merely as an alternative" to using a federal employee, so that the United States Mint could secure a copyright in the design.

The court declined to follow the defendant's presumption of subterfuge. Instead, it found a proper purpose for the United States Mint's use of outside talent. The court was convinced by the federal agency's stated goal of avoiding the "static" nature of its in-house designs. It placed particular significance on the source-blind selection process, which considered copyrightable outside designs equally with uncopyrightable designs submitted by federal employees.

The court concluded that the United States Mint had properly commissioned the work, that the outside designer could copyright her design, and that she could assign that copyright to the United States Mint under the commissioning agreement. With the copyright properly obtained, the United States Mint had standing to bring the copyright infringement suit. The defendant advertised its replica as an "exquisite adaptation of the new United States Dollar coin",[244] so the existence of copyright in the design of the original coin logically lead the court to enjoin the copying of the design.[245]

These cases show great deference to federal agencies in commissioning works. A federal actor can allow the work to enter the public domain. It may also allow the contractor to retain the copyright to the work, as seen in *Schnapper*. Finally, as seen in *Washington Mint*, the federal agency can arrange to have the contractor's copyright assigned to it to manage.

Nonetheless, both of the reported cases discuss the possibility of the government commissioning works with the intent to circumvent the prohibition on copyrighting federal government works.[246] And the very existence of the cases evidences the expenditure of private and public funds and efforts to decide if the intent to commission was such a subterfuge. And the bright line rule announced in *Schnapper* -- have "government employees been detailed as consultants or employees of "the contractor"[247] -- clearly prohibits otherwise useful joint projects, where the efforts of government employees are evenly mixed with outside talent.

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[244] *Id.* at 1093.

[245] *Id.* at 1107.

[246] *Schnapper*, 667 F.2d at 109; *Washington Mint*, 115 F. Supp. at 1085.

[247] *Schnapper*, 667 F.2d at 109.

Allowing federal government works to be copyrighted would directly remove the confusion. It would also open the door to more synergistic joint ventures, which could be undertaken with clear property protection on the resulting works.

F. Incentivise Creation

Ensuring an environment that protects and prompts creation is a major purpose of copyright law. The basic mechanism for this is a limited monopoly over the use of creations, as set out in the Copyright Clause of the United States Constitution, which charges Congress with the authority to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[248]

This monopoly allows creators to be rewarded in artistic terms, such as ensuring that their work is used in a particular way. They may generally block modifications or other derivative works, if they choose, or permit such uses if they meet with their approval.

The most frequent use of the monopoly power is for financial gain. The marketplace finds uses for a particular work, and the creator grants permission to use her work, typically in exchange for royalty payments. This recompense not only rewards existing creations, it also prompts the creation of new works as creators seek similar financial gain.

The U. S. Supreme Court has repeatedly noted importance of the monopoly to drive the creation of new works:

> [I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.[249]

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[248] U.S. Const. art. I, § 8, cl. 8.

[249] Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539, 558 (1985).

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'[250]
>
> The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.[251]

Financial gain -- while considered wholly appropriate in a capitalist private economy -- has been criticized as an improper motivation for public sector action. The government should undertake activities based on the broad needs of its citizens, rather than focus on those activities that produce revenue. This criticism is addressed in depth in Section IV(E), but essentially concerns misdirecting government efforts and taking revenue from the private sector.[252]

Setting aside these valid concerns for a moment, the incentive effect of financial gain has been successfully used in the public sector to spur creation. The federal government explicitly added financial incentive as one facet of a massive technology transfer program. President Ronald Reagan included it in quite certain terms in an executive order:

> By the authority vested in me as President by the Constitution and laws of the United States of America, including the Federal Technology Transfer Act of 1986 (Public Law 99-502), the Trademark Clarification Act of 1984 (Public Law 98-620), and the University and Small Business Patent Procedure Act of 1980 (Public Law 96-517), and in order to ensure that Federal agencies and laboratories assist universities and the private sector in broadening our technology base by moving new Knowledge from the research laboratory into the development of new products and processes, it is hereby ordered as follows:
>
> Section 1. Transfer of Federally Funded Technology.
>
> [* * *]

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[250] Mazer v. Stein, 347 U.S. 201, 209 (1954).

[251] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[252] *See supra* notes 158-163 and accompanying text.

(b) The head of each Executive department and agency shall, within overall funding allocations and to the extent permitted by law:

[* * *]

(5) implement, as expeditiously as practicable, royalty-sharing programs with inventors who were employees of the agency at the time their inventions were made, and cash award programs.[253]

This broad direction was quickly implemented in the Federal Technology Transfer Act with specific guidelines for rewarding federal research laboratories and the inventors working within them. The guidelines show a balance in incentivizing both the facility and the individual with royalties received from licensing and assigning inventions. For covered research labs, inventors are to receive the first $2,000 of royalties received and then 15% of additional royalties.[254] The balance goes to the research laboratory for to enhance research and development,[255] educate and train employees,[256] further technology exchange with other laboratories,[257] administer its licensing program,[258] and generally reward technology employees of the laboratory.[259]

The Federal Technology Transfer Act guidelines also contain "safety valves" that redirect royalties that reach key trigger points. An individual is generally limited to $150,000 of these

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[253] Executive Order 12591 (April 10, 1987).

[254] 15 U.S.C. § 3710c(a)(1)(A)(i) (2002).

[255] *Id.* at § 3710c(a)(1)(B)(v).

[256] *Id.* at § 3710c(a)(1)(B)(iii).

[257] *Id.* at § 3710c(a)(1)(B)(ii).

[258] *Id.* at § 3710c(a)(1)(B)(iv).

[259] *Id.* at § 3710c(a)(1)(B)(i).

incentive payments per year.[260] Laboratories are limited in two ways. First, any royalties not used by the lab within two years are paid into the U.S. Treasury.[261] Along with that temporal limit, a dollar limit is triggered if royalties exceed five percent of an agency's annual budget; the laboratory may use only twenty-five percent of the excess, with the remaining seventy-five percent paid into the Treasury.[262]

The United States Air Force program provides a typical structure:

> Pursuant to AFI 38-401 [the Air Force Innovative Development Through Employee Awareness (IDEA) Program], an invention award will be paid to each inventor when a patent application is filed, and a patent award will be paid to each inventor when Letters Patent is issued, a Statutory Invention Registration is published, or when a notice of allowability has been received for a patent application which is under a secrecy order.[263]

Certainly, an incentive system needs to be carefully constructed and managed. As discussed in Section IV(F) of this paper, some proponents of the current Section 105 prohibition fear that a government works copyright might lure government employees and agencies from their appointed tasks. This fear should be allayed by the successful experience with federal patent royalties.

G. Insure Information Integrity

Another purpose of copyright law is to provide authors a high degree of control over adaptations of their works. Copyright law contains a few limited "fair use" exceptions -- familiar modifications like excerpting passages in a review of the work, or stretching elements to make a

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[260] *Id.* at § 3710c(a)(3). This limit is in addition to any salary due to the individual. Also, the President may authorize a larger amount for specific individuals.

[261] *Id.* at § 3710c(a)(1)(C).

[262] *Id.* at § 3710c(a)(2).

[263] U.S. Air Force Instruction 51-303, *Law, Intellectual Property--Patents, Patent Related Matters, Trademarks and Copyrights*, para. 9.1.

parody of the original work.[264] Also, some very limited categories of works may be adapted simply by paying a predetermined royalty amount; the most common examples of these compulsory licenses are "cover songs" -- new recordings of existing musical recordings.

Aside from these very limited uses, an author may block nearly any modification of her work. Her work may be copied and distributed only in the form she approves.

Some federal actors have advanced this argument in support of a federal works copyright. Federal agencies, they argue, should be able to similarly control the integrity of their works. Without the protection of copyright, federal works can be fully excerpted and adapted without any approval of the creating agencies.[265]

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[264] "Fair use" is considered on a case-by-case basis using a four factor analysis set out in 17 U.S.C. §107:

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work."

[265] It should be noted that while approval is not necessary, attribution is effectively required. Copyright notice is no longer required under United States copyright law, but the Copyright Act rewards such notice with the evidentiary weight to overcome a defense of innocent infringement. If a work contains a copyright notice, then an infringer may not claim ignorance that the work was copyrighted. 17 U.S.C. § 401(d) and 17 U.S.C. § 402(d).

If a work primarily contains federal government information, then any copyright notice must also identify the portions of the work sourced from the government. 17 U.S.C. § 403. This notice is meant to separate the protected copyrighted portion of the work from the government information that anyone may freely copy.

This "requirement", though, is severely hindered: it does not impose any affirmative obligation on the copyright holder. A publisher cannot "violate" § 403; the sole consequence of not identifying the government information is allowing an alleged infringer to assert the innocent

Critics of the status quo suggest that it permits several dangers. First, there is a general reputational danger to a federal agency if its works are allowed to be quoted out of context. This leads to the more specific dangers of federal works being misunderstood and misused.

An example illustrates how these dangers operate. Information integrity was raised by the federal agency in *Petroleum Information* discussed above.[266] The Bureau of Land Management sought to protect the release of oil and gas lease records it was compiling and converting into a centralized computer database. The Bureau argued that releasing its work as requested would lead to the public seeing incomplete and error-filled information -- which seemingly had the Bureau's imprimatur.[267] The Bureau raised the specific danger that the public

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infringement defense. Matthew Bender & Co. v. West Publishing Co., 240 F.3d 116 (2d Cir. 2001).

Further, some publishers have included the § 403 notice of government information, yet avoid its purpose through a license that restricts open access to the information. This is succinctly explained in a recent amicus curae brief criticizing the attempt of copyright holders to expand their control of works:

> For a concrete example, see the copyright notice on WESTLAW. Federal cases are works of the U.S. Government not subject to copyright protection. 17 U.S.C. § 105 (1977). Although West Publishing says it does not claim any copyright on U.S. Government works (as it must to make its notice effective, 17 U.S.C. § 403 (1977)), the notice goes on to say: "No part of a WESTLAW transmission may be copied . . . except as permitted . . ." West thus disclaims copyright as it claims it.

Brief Amicus Curiae of Eleven Copyright Law Professors in Princeton University Press v. Michigan Document Services, Inc., also published at 2 J. Intell. Prop. L. 183, 211 (Fall 1994).

These factors combine to make § 403 notice far less effective than the attribution private copyright holders may negotiate for the use of their works.

[266] *See supra* notes 189-196 and accompanying text.

[267] 976 F.2d 1429, 1436.

might be misled by some erroneous information.[268] It also involved the general danger to the Bureau's reputation, tainting it as the source of erroneous information.[269]

The same dangers were raised -- and extended -- regarding the MEDLARS medical literature database discussed above.[270] The federal author of that work, though, went beyond the concern of incomplete and erroneous information while creating the work. It sought to control its work on an ongoing basis. It pointed to the nature of the work being continuously updated; licensees were provided current copies of the work and also required to post corrections to the work. The federal agency argued that this integrity would be lost if others were able to obtain the work without license.[271]

The specific danger of misuse was raised by the Federal Law Enforcement Training Center regarding its training videos.[272] The Director of the FLETC argued that distribution and use of the works needed to be strictly controlled. The training videos described investigative techniques; uncontrolled use of the videos could enable a very unintended audience to circumvent the law,[273] possibly placing law enforcement agents in physical danger in the process.[274]

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[268] *Id.*

[269] *Id.*

[270] *See supra* notes 197-208 and accompanying text.

[271] The issue of information integrity was raised in testimony before a House Subcommittee investigating federal agency use of electronic information. *Electronic Collection and Dissemination of Information by Federal Agencies: Hearings Before a Subcommittee of the House Committee on Government Operations*, 99th Cong., 1st Sess. 277-78 (1985).

[272] *See supra* notes 113-120 and accompanying text.

[273] 5 U.S.C. § 552(b)(7)(E) (exempting release under FOIA of information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose

It must be noted that the information integrity arguments have not met with success. Both Congress and the courts have found the dangers either non-existent or avoidable through other means. The *Petroleum Information* court found that public confusion was a factor to consider, but was unconvinced that such confusion existed in the case before it -- and thought that the public could be adequately warned in any event:

> Overall, the public availability of the data in the LLD file severely weakens the Bureau's arguments that release of the data base will confuse the public by providing it with erroneous information which falsely appears to have the Bureau's imprimatur. In short, one can demur to [the Bureau's] insistence that errors mar the current version of the LLD file, for the Bureau does not suggest that the file is any less accurate than the already public source documents. The Bureau, moreover, does not convincingly explain why its concerns with public confusion and harming its own reputation could not be allayed by conspicuously warning FOIA requesters that the LLD file is as yet unofficial and that the Bureau disclaims responsibility for any errors or gaps.[275]

A similar approach was suggested by the House Committee considering the integrity concerns surrounding MEDLARS.[276] As with the *Petroleum Information* court, the House Committee first found the danger to be non-existent, then also continued by suggesting alternative solutions. The main integrity danger raised involved the ongoing updates to the data; the Committee, though, found that the lag in posting corrections belied the importance of

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guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law").

[274] 5 U.S.C. § 552(b)(7)(F) (exempting release under FOIA of information that "could reasonably be expected to endanger the life or physical safety of any individual").

[275] *Petroleum Information*, 976 F.2d. at 1436.

[276] *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, 99th Cong., 2nd Sess. 23, 30 (1986).

integrity to the work.[277] And if accuracy was important, then the Committee believed that the marketplace would provide a solution.[278]

Still, information integrity would be a valuable benefit of a federal government works copyright. The right to control a work is strongly valued by private copyright holders.[279] And bringing that traditional right to federal agencies would also streamline the process; agencies would no longer be forced to turn to a patchwork of alternatives that may less protection, or guess if a court will agree with its determination of a particular danger.

VI. A Proposal to Protect United States Government Works

A. Overview: The Time for Protection

The current prohibition on copyrighting federal government works should be changed.

On the surface, the extreme prohibition is out of step with the intellectual property laws of other nations. Harmonizing the protection of federal government works would strike a balance with the protections other countries extend to their governmental works. This rebalancing would be fair -- and likely to inure to the benefit of the United States with its large range of government works. Even proponents of the current system could see a federal government works copyright as "strong medicine" leading to an eventual "cure"; the newly-protected resource could be used as a treaty bargaining chip to barter for the removal of national copyrights across the world.

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[277] *Id.*

[278] *Id.* at 32.

[279] The right to control a work, though, is not unlimited even to private copyright owners. *See* Rosemont Enterprises v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) (balancing copyright owner's economic interest, but valuing it less than fair use benefit to public interest in another biography of Howard Hughes).

Looking beyond simple fair trade, the fundamental reasons for the prohibition do not require such an extreme prohibition. The current prohibition developed from genuine values -- but those concerns can be adequately addressed without incurring the costs of giving up all protection of federal government works. Regardless of the protection regime, citizen access to laws that govern their action and information that guides their democracy must be honored. And it is quite possible to change the current system while still recognizing the principles of unbiased and efficient access, and not diverting government efforts into commercial competition.

And the extreme prohibition on copyright protection is in disharmony with patent law protection. Federal government research results in many types of works. The research that results in patentable inventions can be protected, with royalties recapturing some of the research cost and also rewarding inventive federal employees. This patent protection for federal research is entering a third decade of showing an alternative model of managing public research -- one that is a successful comparison to copyright law's prohibition on all protection.

B. A Basic Mechanism for Protection

The licensing mechanism of the Canadian model provides a good starting point.[280] The flat-rate royalty removes fears that political bias could appear in pricing strategies. Political bias is also directly removed by a set of limited (and defined) reasons for denying permission to use a government work.[281]

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[280] The Canadian system is discussed in depth supra at notes 68-69 and accompanying text

[281] An open licensing model also obviates the need for a "march in" right. The right is a critical "safety valve" for protecting the public interest in exclusive patent rights. *See supra* notes 103-106 and accompanying text. The open licensing model proposed here, though, accommodates "unproductive" uses without burdening prospective productive users. Certainly, any proposal for exclusive copyright in government works should contain a "march in" right, so that the taxpayers' investment is not locked up in unproductive uses; an exclusive copyright would also

Basic citizen access to information is ensured by waiving the permission requirement for many common uses. Citizen use is also efficiently ensured by the 25% rule -- charging royalties only if a work contains a threshold amount of government work. Similarly, the public good is recognized by not charging for use by non-profit organizations. Finally, if an agency determines that free use is the best way to disseminate a particular work, then it can explicitly grant permission on the work itself -- or weigh permission on a case-by-case basis, granting free use for those uses that further government objectives.

Some additional protections should be layered onto this basic licensing mechanism. An explicit exception for the media is a primary concern. Many news reports would fall within one of the other exceptions, consisting of less than 25% government work, for example. But the vital role of the media in American culture (and its well-protected place in the Constitution) should not rest on possibly falling within one exception or another.

The Japanese model contains a particularly clear exception[282] -- although it should be expanded in two ways. Most importantly, the Japanese exception allows the media to quote and reproduce "public information materials" created "for the purpose of informing the general public". This focus should be broadened to cover all government works. A media exception concerned only with what government wants to release can hardly lead to effective reporting. To

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raise presumptively fatal due process concerns if applied to case law and legislation, as discussed *supra* in § IV(A).

[282] Article 32(2) of the Copyright Act provides:

> Public information materials, studies and statistic materials, reports, and like works prepared by organs of the State or local public entities, or by independent administrative corporations, for the purpose of informing the general public and published in its or their names may be reproduced in newspapers, magazines, or other publications for the purpose of explanation; provided, however, that this shall not apply when such reproduction is expressly prohibited.

properly expose the workings of government, the exception should go beyond items the government wants to release to reach the works it does not want publicized.[283]

The focus on printed works and printed media should also be expanded. The federal government creates many other types of works that may be of interest to the public through the media. And the public receives information through many types of media, with newspapers and magazines declining in favor of electronic media.

The expanded definition should also address the use of government works in electronic databases. Media articles present a difficult case. Public awareness is generally generated with the initial publication or broadcast, and perhaps follow-up articles that reference the original article. Yet, individual citizens may also gain a better understanding of their government by referencing past articles -- and many electronic databases have developed to fill that need.

A solution can be drawn by limiting the media exception to initial publication. Later accesses will be naturally guided by the other licensing provisions. If an article is accessed later through a fee-based database, then it should be licensed so that the royalty given to the initial publisher is properly shared with the government author. This should be tempered with a 25% rule, so that licensing would not be required where the article draws facts or small excerpts from federal government works.

Treatment of electronic databases containing federal law -- perhaps an even more difficult issue -- also resolves itself by application of the general license provisions. Citizen access to laws for individual use would fall within the general exemptions. Commercial collection of laws (with or without other documents) into an electronic database, though,

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[283] Understandably, some government works might be legitimately withheld from release. The Freedom of Information Act exemptions are a workable guide. *See supra* notes 113-120 and

presents a different situation. If access to the database is provided at no charge, then no royalties should be charged. Conversely, if a charge is made to use the database, then some of the fee should go to reimburse the taxpayer.

Finally, the licensing mechanism might serve all parties more efficiently if basic no-charge uses were converted to no-license uses. The change would greatly reduce the burden of both requestors and the licensing authority. The licensing authority would be freed to respond more quickly to necessary requests, and requestors would be more likely to make necessary requests.[284]

C. Licensing for Fairness to All Parties

Actual licensing responsibility could follow one of two models. It could be centralized, as with the Canadian model. Centralization would provide an added degree of unbiased released, with the licensing authority removed a step from the agency that created the work. A centralized system may also be more efficient, concentrating expertise for the government and presenting "one stop shopping" for the public.

The obvious candidate for this is the United States Government Printing Office. The GPO already has vast experience working with other federal agencies, printing and distributing their works to the public, and collecting funds to reimburse the taxpayer for the printing and distribution costs.

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accompanying text. The FOIA exemptions could be explicitly adopted to benefit from the body of law developed to clarify each exemption.

[284] Focusing the regulatory burden on only necessary cases will promote adherence -- helping to avoid a situation that occurred under the license-heavy Canadian system. The burden of requesting licenses for every use created an atmosphere of laxity in requests and enforcement of paper-based government works. Users of information sought to avoid the burden and simply did not seek permission to reproduce it. The situation is recounted in Gellman, *supra* note 218, at 1012.

The licensing responsibility could also be dispersed through each federal agency. At a minimum, the authority should be delegated through a hierarchical system -- with the final decision authority firmly outside of an individual federal agency. Capping the authority within each agency raises extreme concerns of political bias, self-interest, and inconsistent policies across the federal government.

A delegated licensing system may have its own efficiencies, particularly with "easy" cases. Where the requester knows the agency that owns the work to be licensed, the two can work directly to license the work -- removing the time taken by intervening levels of a centralized system. Each agency understands its works best, too, and so is best situated to respond to requests to license those works; a particular work may not exist, but a close substitute may be negotiated.

A model for the delegated system can be seen in the existing Freedom of Information Act structure. FOIA authority is dispersed to each federal agency, but with hierarchical authority to review decisions to deny release of information. Requestors may also go outside of the hierarchy, turning to judicial review of decisions on FOIA requests.

The FOIA structure carries several immediate benefits. Federal employees and the public have worked with the structure for several decades. The Act forcefully imposed the concept of accessing federal information. Beyond this ground-breaking effect, a wealth of institutional knowledge in releasing federal information has built up around the Act. Federal employees are already educated in accepting and processing requests for information and the FOIA process has penetrated the general public perception (and is now well-known to FOIA practitioners). Certainly, the introduction of the proposed licensing model should be accompanied by additional training for federal employees (specifically on mechanics and generally on marketing, perhaps

based on the seminars given in California).[285] The introduction should also provide for a public awareness campaign, with particular emphasis on educating traditional major users of government works.

The similarity of subject matter is more than superficial, too: some requests to license government works may be more appropriately handled as releases of information under FOIA. Similarly, a request submitted under FOIA might actually involve a license. Such decisions could be eased by placing the responsibility of licensing with existing FOIA representatives. Further, a rich body of law has developed to clarify the release of information under FOIA; much of that would be applicable to a licensing program, and could be referenced by analogy or explicitly adopted in the new program.

There is a final critical component of the proposed licensing system: royalty sharing. It must balance recovering some of the taxpayers' investment without distorting the government's mission. Within that larger concern, royalty sharing must also consider rewarding employees and agencies against the fundamental provision that all revenues return to the general treasury.[286]

The Federal Technology Transfer Act[287] guidelines provide an excellent model for managing royalties.[288] Individual employees are rewarded with a meaningful percentage of the royalties from their work. Yet the amount is not exorbitant; that -- and an overall cap on each employee's receipt and good management -- keeps royalties from distorting an individual's efforts from their government-appointed tasks.

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[285] *See supra* note 71 and accompanying text.

[286] 31 U.S.C. § 3302(b) (stating that absent express statutory authority, money received by a federal agency must be deposited in the General Treasury).

[287] 15 U.S.C. § 3710c(a)(1)(A)(i) (2002).

[288] *See generally supra* notes 253-263 and accompanying text.

The FTTA guidelines also manage royalties received by federal agencies, so that an agency-wide mission is not distorted. An agency's royalties may only be used for specific, research-oriented uses; this invests today's royalties from yesterday's work into research for tomorrow. And royalties are also tied to an agency's budget, diminishing significantly at a set point. This cap allows royalties to ease an agency's budget and pay for minor improvements, but keeps the agency from gaining a mission-changing critical mass of funding from royalties.

D. Closing Thoughts

These successful components from related foreign and domestic laws can be combined into a useful licensing model. The edges of each component fit neatly with the others, with no conflicting overlap or unwanted gap.

Moreover, the resulting licensing model meets each of the desired improvements -- without tripping upon any of the noted dangers. Time-honored basic access rights would continue to be honored. Citizens could access government works (particularly laws) for individual understanding. Broader public understanding could continue to flow from the media. And public-oriented uses would not require a license (or be granted a fee-free license).

For uses requiring a license, the licensing responsibility -- placed in a familiar institution with known processes -- would permit quick and efficient licensing decisions based on clear, unbiased principles (with the strong default in favor of licensing). The incentive effect of royalties has proven not to distort the mission of government agencies or employees in context of patents; strong leadership should keep employee efforts on target in the copyright context, too.

The benefits gained by the proposed licensing model are impressive. First, there is the general fairness of managing a national resource for the benefit of taxpayers. This is specifically visible in the way the system directly links some costs of a government work to the benefit of

those who use the work. This includes recovering from those who currently benefit from federal government works without even indirectly supporting their creation through taxes, striking a balance with the copyright policies of international trading partners. And even uses that are granted a no-fee license can be measured, making the subsidy to those users visible for public debate.

Another benefit comes from the general incentive effect of royalties. While not an overriding concern as in commercial enterprise, licensing revenue can provide welcome recognition to individual employees, assist the budget of their agencies, and lessen the burden on the taxpayer -- as proven with federal government patent royalties.

And a set of related benefits are based on the desire of federal agencies to protect their works. A system that offers that protection will bring transparency to agency actions, as they turn from fashioning poor substitutes to licensing their data. A clear system of government rights will also greatly ease joint ventures with universities and business (as seen with Cooperative Research and Development Agreements in the patent context).

Finally, the proposed system would also bring federal copyright policy in step with federal patent law, state copyright policies, and the protection other countries give to their government works. When there are reasons to be different, the United States has a proud history of being different. But it is also a nation that grown through change by adopting the best ideas, from its own citizens and from other countries.

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Appendix A: National Policies of Copyright in Government Works

I. Introductory Notes

This appendix catalogs the copyright laws of many nations, with the specific focus on how each country treats its government works. Much of the information in this survey came from two sources. INTERNATIONAL COPYRIGHT LAW AND PRACTICE[289] and COPYRIGHT LAWS AND TREATIES OF THE WORLD.[290] The first work reproduces sections of the national law where necessary, but is essentially expert commentary on many aspects of each country's copyright law. The second work is a compilation of the actual copyright laws of many nations, translated into English.

To assist in comparisons between nations, each country is summarized along natural dividing lines. All of the countries recognize some protection of government works, but many prohibit copyright in national laws.

Some countries explicitly authorize copyright in government works, while others protect works indirectly; the indirect protection can come from the general principle that protection is extended to all works not specifically excluded from protection. Indirect protection also often flows from the natural action of "service-related works" where the employer owns the copyright of works created as assigned to employees. (And, similarly, the "works made for hire" principle can place the copyright of contracted works in the government.)

II. National Copyright Policy Summaries

Argentina[291]

Government Works Copyright Available (Yes / No)

Yes.

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[289] PAUL EDWARD GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE (13th ed. Nov 2001) (hereinafter ICLP).

[290] THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1997) (hereinafter CLTW).

[291] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright protection is not extended to laws.

Research Reports, Studies, Essays: Yes, copyright is claimed in other works.

Source of Protection (Explicit / Indirect)

Indirect. Copyright protection is claimed through general employer-employee law, giving employers ownership of work assigned to employees.[292]

Unique Aspects

Special protection is extended to speeches made in Congress. Commercial use of such a speech requires the permission of the speaker.[293] Commercial use, though, does not include news reporting.

Australia[294]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, protection may be claimed in all government works. Such claims are clearly asserted in statutory law (such as Acts of Parliament);[295] judicial decisions, though, are not treated consistently.

Research Reports, Studies, Essays: Yes, copyright may be claimed in all government works.[296]

Source of Protection (Explicit / Indirect)

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[292] Law 20,774.

[293] Article 27 of the Copyright Act.

[294] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[295] Copyright Act, Sec. 8A(2).

[296] Copyright Act, Secs. 176-183.

Direct. Protection is sourced in Crown Copyright, carried through in the Copyright Act of 1968.

Unique Aspects

Belgium[297]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright protection is not extended to laws.[298]

Research Reports, Studies, Essays: Yes, copyright is claimed in all other works.

Source of Protection (Explicit / Indirect)

Indirect. Copyright protection is claimed through general employer-employee law, giving employers ownership of work assigned to employees.

Unique Aspects

Canada[299]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, copyright is extended to laws.[300] Note, though, that the Reproduction of Federal Law Order (1997) allows the free reproduction of federal enactments and decisions.[301]

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[297] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[298] 1994 Copyright Act, Art. 2(1).

[299] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

Research Reports, Studies, Essays: Yes, copyright protection is claimed in all other government works, whether contracted out or created within the government.[302]

Source of Protection (Explicit / Indirect)

Explicit. The ability to copyright government works are set out in law.

Unique Aspects

Canada sets out a specific licensing regime, with a default of issuing a license unless the request is determined to:

(a) be in an undignified context;
(b) be considered as an unfair or misleading selection;
(c) be used for advertising purposes in an undesirable manner;
(d) be used in a context that may prejudice or harm a third party;
(e) be considered inappropriate by the department in question for legal or other specifiable reasons.[303]

If the license is granted, then the fee will generally be 10% of the net sales revenue (including electronic uses). Minor uses -- where the government work comprises less than 25% of the work -- require no fee. Also, departments can waive fees for uses that assist it accomplish its mission.

Also, individual publications can carry notice that they may be reproduced without permission.

China[304]

Government Works Copyright Available (Yes / No)

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[300] Copyright Act, Section 12.

[301] SI/97-5, 131 Can. Gaz. (PT II) 444 (Jan. 8, 1997).

[302] Copyright Act, Section 12.

[303] Treasury Board of Canada, Circular No. 1986-25, dated June 11, 1986, on Crown Copyright, para. 7 and Schedule 1.

[304] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is prohibited in laws, regulations, decisions, and other documents of legislative, administrative and judicial nature.[305]

Research Reports, Studies, Essays: Yes, copyright protection is extended to other government works.

Source of Protection (Explicit / Indirect)

Indirect. The ability to copyright government works flows from employer-employee law.

Unique Aspects

None.

Cuba[306]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, copyright is not explicitly prohibited in laws.

Research Reports, Studies, Essays: Yes, "Copyright is recognized in respect of works created in the course of employment by any State organisation, institution, entity or undertaking, or social or people's organisation."[307]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

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[305] Copyright Act, Art. 5.

[306] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

[307] Copyright Statute, Art. 19.

Renumeration is deemed to be included within the author's salary; exceptional cases of additional renumeration may be made only by the Council of Ministers.[308]

France[309]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, although copyright is traditionally not enforced by the government.[310]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works, whether contracted out or created within the government.

Source of Protection (Explicit / Indirect)

Indirect.

Unique Aspects

None.

Germany[311]

Government Works Copyright Available (Yes / No)

Yes.

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[308] Copyright Statute, Art. 20.

[309] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[310] *See* H. Desbois, *Le droit d'auteur en France*, nos. 39 *et seq.* (3rd ed., Paris, 1978).

[311] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is prohibited in acts, regulations, official decrees, and decisions.[312]

Research Reports, Studies, Essays: Yes, although copyright protection is disclaimed in official works published for public information.

Source of Protection (Explicit / Indirect)

Explicit. The ability to copyright government works is directed set out in law, flowing from traditional employer-employee law.

Unique Aspects

Greece[313]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is prohibited to "official texts by which the will of the state is expressed and especially to legislative, administrative or judicial texts".[314]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works that do not express the will of the state. The media, though, is given explicit permission to reproduce political speeches and other newsworthy events.[315]

Source of Protection (Explicit / Indirect)

Indirect. The ability to copyright government works flows from traditional employer-employee law.

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[312] Copyright Act, Section 5.

[313] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[314] Copyright Act, Art. 2(5).

[315] Copyright Act, Art. 25.

Unique Aspects

Government works not yet published may be protected by copyright law.

Hong Kong[316]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, copyright is extended to laws.[317]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in all government works.[318]

Source of Protection (Explicit / Indirect)

Explicit. The ability to copyright government works is grounded in Crown Copyright, which has now been converted to government copyright.

Unique Aspects

None.

Hungary[319]

Government Works Copyright Available (Yes / No)

Yes.

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[316] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[317] Copyright Ordinances, Sections 182-6.

[318] Copyright Ordinances, Sections 182-6.

[319] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is prohibited in "legislative texts, public decisions, official notices and files, standards, and other compulsory regulations".[320]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works.

Source of Protection (Explicit / Indirect)

Indirect. The ability to copyright government works flows from traditional employer-employee law.[321]

Unique Aspects

None.

India[322]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, copyright is extended to laws, as it covers all government works.[323] Note, though, that this blanket coverage is effectively retracted by an exemption that explicitly allows free use of legislative, judicial, and related maters -- unless the authority has prohibited reproduction.[324]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in all government works, whether contracted out or created within the government.[325]

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[320] Copyright Act, Art. 1(4).

[321] Copyright Act, Art. 30(7).

[322] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[323] Copyright Act, Section 2(k).

[324] Copyright Act, Section 52(1).

[325] Copyright Act, Section 2(k).

Source of Protection (Explicit / Indirect)

Explicit. The ability to copyright government works are directed set out in law.

Unique Aspects

None.

Ireland[326]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, copyright is not explicitly prohibited in laws.

Research Reports, Studies, Essays: Yes, copyright protection is claimed in "every original literary, dramatic, musical or artistic work, sound recording and cinematograph film made by or under the direction or control of the Government or a Minister of State".[327] This claim is made, even "if apart from this section copyright would not subsist in the work, copyright shall subsist therein by virtue of this subsection".[328]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

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[326] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

[327] Copyright Statute, 51(1).

[328] Copyright Statute, 51(1)(a).

Israel[329]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, copyright is extended to laws, as it covers all government works.[330] Note, though, that open proceedings of the Knesset may be free reproduced (unless specifically prohibited).[331]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in all other government works, whether contracted out or created within the government.[332] (Authors working under contract may negotiate to retain copyright.)

Source of Protection (Explicit / Indirect)

Explicit. The ability to copyright government works are directed set out in law.

Unique Aspects

None

Italy[333]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

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[329] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[330] Copyright Act, Section 18.

[331] Section 28 of the Basic Law: Knesset (Parliament).

[332] Copyright Act, Section 18.

[333] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

Statutory Law and Case Law: No, copyright is prohibited in "official acts", including statutes, laws, and judicial decisions.[334]

Research Reports, Studies, Essays: Yes, copyright protection is available to other "non-official" government works, whether contracted out or created within the government.[335]

Source of Protection (Explicit / Indirect)

Explicit. The ability to copyright government works are directed set out in law.

Unique Aspects

Italy extends its prohibition on copyright in "official acts" to foreign laws, as well, placing them in the public domain (irregardless of any issuing nation's claim of copyright). Also, Italy designates a much briefer term of protection for the copyrightable "non-official" works: 20 years vice the standard term of 70 years.[336]

Japan[337]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in laws.[338]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works, although a broad exception is carved out for "public information materials".[339] These "white papers" or hakusho are prepared to inform the general public. They may be quoted or reproduced in the media -- unless specifically prohibited.

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[334] Copyright Act, Art. 5.

[335] Copyright Act, Art. 11.

[336] Copyright Act, Art. 29.

[337] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[338] Copyright Act, Art. 13.

[339] Copyright Act, Art. 32(2).

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Korea[340]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in statutory law[341] and judicial decisions.[342]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works, although public speeches in court and the National Assembly[343] and public notifications[344] are specifically exempted from protection. These public notifications include bulletins and directives -- whether issued at the national or local level.

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

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[340] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[341] Copyright Act, Art. 7(1).

[342] Copyright Act, Art. 7(3).

[343] Copyright Act, Art. 7(6).

[344] Copyright Act, Art. 7(2).

Netherlands[345]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in laws.[346]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works, although they may be freely copied and published -- unless expressly reserved, or placed in a compilation.[347]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Netherlands extends its exemption of free use of government works to foreign government works, as well, placing them in the public domain (irregardless of any issuing nation's claim of copyright).

Nigeria[348]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, copyright is not explicitly prohibited in laws.

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[345] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[346] Copyright Act, Art. 11.

[347] Copyright Act, Art. 15b.

[348] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

Research Reports, Studies, Essays: Yes, "Copyright shall be conferred by this section on every work which is eligible for copyright and is made by or under the direction and control of the Government, a State authority or a prescribed international body."[349]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Poland[350]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in statutory law.[351]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works, although simple press reports and "official documents" like guidelines, proclamations, and letters are specifically exempted from protection.[352]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

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[349] Copyright Decree of 1988, Section 4(1).

[350] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[351] Copyright Act, Art. 4.

[352] Code of Civil Procedure, Art. 244 (defining "official documents").

Russian Federation[353]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in "official documents (laws, court decisions, other texts of legislative, administrative or judicial character)".[354]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works, whether contracted out or created within the government (through traditional principles of "work made for hire" and "service-related work" completed as assigned by the employer).[355]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Rwanda[356]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright "protection shall not be afforded to laws, judicial decisions or decisions of administrative bodies."[357]

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[353] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

[354] Law on Copyright and Neighboring Rights, Art. 8.

[355] Law on Copyright and Neighboring Rights, Art. 14.

[356] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

[357] Copyright Statute, Art. 7.

Research Reports, Studies, Essays: : Yes, copyright protection may be claimed in other government works.

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Saudia Arabia[358]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in "laws, decisions by judicial and administrative bodies, international agreements, official documents and official translations of such texts, subject to the provisions on the dissemination of such documents."[359]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works.

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Singapore[360]

Government Works Copyright Available (Yes / No)

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[358] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

[359] Copyright Statute, Art. 6(a).

[360] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, copyright is claimed in laws, as with all government works. Note, though, any copyrighted material (government or private) may be used in a judicial proceeding or by a solicitor rendering legal advice.[361]

Research Reports, Studies, Essays: Yes, broad copyright protection is claimed for "every original literary, dramatic, musical or artistic work made by or under the direction or control of a Government department".[362] This claim is made, even if "if apart from this section copyright would not subsist in the work, copyright shall subsist therein by virtue of this subsection".[363]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Spain[364]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in laws.[365]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works, whether contracted out or created within the government (through traditional "work made for hire" principles).

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[361] The Copyright Act of 1987, Section 38.

[362] The Copyright Act of 1987, Section 197(1).

[363] The Copyright Act of 1987, Section 197(1)(a).

[364] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[365] Copyright Act, Art. 13.

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Sweden[366]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in laws.[367]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in particular categories of government works, including computer programs, maps, educational materials, findings of scientific research, drawings, paintings, musical works, and poems.[368]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

Switzerland[369]

Government Works Copyright Available (Yes / No)

Yes.

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[366] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[367] Copyright Act, Section 9(1).

[368] Copyright Act, Section 26a.

[369] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in statutory law[370] and judicial decisions.[371]

Research Reports, Studies, Essays: Yes, copyright protection is claimed in other government works, although it is discouraged for works with a public interest in general distribution.

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage (through traditional "work made for hire" and employer-employee principles).

Unique Aspects

Thailand[372]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in: "Constitutions and legislations",[373] "regulations, by-laws, notifications, orders, explanations, and correspondence of the Ministries, sub-Ministries,, Departments or any other state or local units",[374] and "judgments, orders, decisions, and reports of the government".[375]

Research Reports, Studies, Essays: Yes, copyright protection may be claimed by the "Ministries, sub-Ministries,, Departments or any other state or local agencies shall be entitled to the copyright

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[370] Copyright Act, Art. 5(1)(a).

[371] Copyright Act, Art. 5(1)(c).

[372] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

[373] Copyright Act, B.E. 2521 (1978), Section 32(2).

[374] Copyright Act, Section 32(3).

[375] Copyright Act, Section 32(4).

in the works created under their employement or direction or control, unless it has been agreed otherwise".[376]

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

United Kingdom[377]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: Yes, Crown copyright is explicitly claimed in laws, as with all other government works.[378] The United Kingdom, though, makes much of its legislation available for free personal use, and has set policies for granting permission for other uses.

Research Reports, Studies, Essays: Yes, Crown copyright protection is claimed in all government works, although policies for use are set out in "Dear Publishers", "Dear Librarian", and "Dear Establishment Officer" letters.[379]

Source of Protection (Explicit / Indirect)

Direct. Crown copyright provides very broad copyright coverage.

Unique Aspects

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[376] Copyright Act, Section 12.

[377] The analysis for this nation is based on information from GELLER, ICLP, *supra* note 289.

[378] C.D.P.A., Sects. 163, 164.

[379] The letters (and management of Crown copyright) are placed in Her Majesty's Stationery Office).

Venezuela[380]

Government Works Copyright Available (Yes / No)

Yes.

Scope of Works Covered (Laws / Other Works)

Statutory Law and Case Law: No, copyright is explicitly prohibited in the "texts of laws, decrees, official regulations, public treaties, judicial decisions and other official acts shall not be protected by this law.".[381] Note, though, that compilations of laws must be submitted for government approval before publication.[382]

Research Reports, Studies, Essays: Yes, copyright protection may be claimed in other works (through traditional principles of "work made for hire" and "service-related work" completed as assigned by the employer).

Source of Protection (Explicit / Indirect)

Indirect. Works not excluded from copyright protection fall within its coverage.

Unique Aspects

[380] The analysis for this nation is based on information from UNESCO, CLTW, *supra* note 290.

[381] Copyright Statute, Art. 4.

[382] Copyright Statute, Art. 138.

Appendix B: State Policies of Copyright in Government Works

I. Introductory Notes

This appendix surveys the copyright policies of the fifty states, with the specific focus on how each state treats its government works. While the United States federal government is prohibited from copyright its government works, that prohibition does not extend to state and local governments.

To assist in comparisons between states, each state is summarized with attention to several categories of government works. Case law and statutory law are two major categories. While many nations protect both or prohibit copyright in both, many states give the two sources disparate treatment -- asserting copyright in the state code, for example, but disclaiming any copyright in the decisions of state courts.

(Also, some states assert copyright in their statutes -- but do not explicitly authorize it within the statutes. This comports with current federal copyright law, which no longer requires formalities of notice and registration -- extending protection to works once the appropriate subject matter is set in a tangible form.)

Another category surveyed special types of works, particularly computer software created by or for the state. Interestingly, several states allow free access of works through state-run computer research systems -- while still claiming copyright in the works for other purposes.

Also, delegated copyright authority is noted (where found). Such authority is often given to institutions of higher education, so that they may protect the results of research and development conducted by faculty, staff, and students. Some states also give blanket delegation to state agencies, while other states specifically delegate copyright authority to individual state agencies.

II. State Copyright Policy Summaries

Alabama

Alabama protects its state code by asserting copyright protection "for the use and benefit of the state".[383]

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[383] Code of Ala. 36-13-5 (2001).

Alaska

Alaska asserts copyright in its state statues (although the authority to claim the copyright is not specifically set out in its statutes).

Alaska authorizes copyright protection of computer software developed by state agencies[384] and extends the same authorization to municipalities.[385] "State agency" is broadly defined, encompassing institutions of higher education, for example.

Arizona

Arizona has authorized its institutions of higher education to protect the results of research. The commercial development of the research can be nurtured by development corporation specifically authorized to protect the research through patent and copyright law.[386]

Arizona also has a unique provision allowing the marketing "products of prisoner or inmate ingenuity, skill or patent".[387] Proceeds are shared with the individual prisoner.

Arkansas

Arkansas has authorized the Arkansas Science and Technology Authority to hold patents and copyrights.[388] The protection furthers the wide ranging mission of ASTA, to "engage in undertakings, programs, enterprises, and activities involving agriculture, manufacturing, medical and health care, transportation, public utility services, research and development, and other programs involving the establishment and encouragement of science and technological research".[389]

California

California authorizes copyright protection for many of its government works.

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[384] Alaska Stat. § 44.99.400 (2001).

[385] Alaska Stat. § 29.71.060 (2001).

[386] A.R.S. 15-1635 (2001).

[387] A.R.S. 31-261 (2001).

[388] A.C.A. § 15-3-108(c)(21) (2001).

[389] A.C.A. § 15-3-108(b) (2001).

Computer software developed by the state may be sold or licensed for commercial or noncommercial use.[390] California, though, explicitly withholds copyright protection from public records that happen to be stored or used with computer software.[391]

California also authorizes school districts to secure copyright in their works.[392] The copyright is in the name of the creating district; each district is allowed to retain all royalties from its works.

Schools, though, are specifically prohibited from expending funds to assist others in securing copyright.[393] This prohibition has been interpreted narrowly, on funds actually spent to register a work for copyright protection. For example, school resources could be joined with those of a private corporation; the private company secured copyright in the resulting work, with school resources focused solely on creating the work.[394]

Colleges are also authorized to copyright works.[395] A unique provision requires the license of works to other state agencies (unless the work is already subject to an exclusive license) -- and the other state agency can only be charged the cost to prepare and reproduce the licensed material.

California also explicitly authorizes its Department of Toxic Substances Control to secure copyright in its works, giving as examples "videotapes, audiotapes, books, pamphlets, and computer software".[396] Royalties stay within the department, directed into its "Hazardous Waste Control Account".[397]

Similarly, explicit authority is given to protect developments from the state's Public Interest Energy Research, Demonstration, and Development Program. The state is to receive an "equitable share", which is determined through "sharing mechanisms" that benefit the state and the individual creator.[398]

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[390] Cal Gov Code § 6254.9(a) (2002).

[391] Cal Gov Code § 6254.9(d) (2002).

[392] Cal Ed Code § 35170 (2002).

[393] Cal Ed Code § 32360 (2002).

[394] California School Employees Asso. v Sunnyvale Elementary School Dist. 36 Cal App 3d 46, 111 Cal Rptr 433 (1st Dist 1973).

[395] Cal Ed Code § 81459 (2002).

[396] Cal Health & Saf Code § 25201.11 (2001).

[397] Cal Health & Saf Code § 25201.11(b) (2001).

[398] Cal Pub Resources Code 25620.4 (2001).

Colorado

Colorado explicitly asserts copyright in its Colorado Revised Statutes.[399]

Colorado places its copyright claim in an unusual place: its Public (Open) Records access statute.[400] Most of the statute defines guidelines for the public to examine records; the statute is comprehensive, covering paper-based and electronic records, for example.[401]

The final clause of the statute, though, states that the public access does not preclude state agencies from "obtaining and enforcing trademark or copyright protection for any public record".[402] Individual public access trumps such copyright protection. Also, interestingly, "any" public record is qualified to exclude protection in mere lists and compilations.

Connecticut

Connecticut delegates authority to copyright case law reporters and other documents to its Commission on Official Legal Publications.[403] Copyrights are held in the name of the Secretary of State and licensed "for the benefit of the people of the state".[404]

Delaware

Delaware claims copyright in its state code; the right to sell copies of the code to nonresidents is explicitly included in the contract to print copies for state use.[405]

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[399] C.R.S. 2-5-115 (2001).

[400] C.R.S. 24-72-203 (2001).

[401] C.R.S. 24-72-203(1)-(3) (2001).

[402] C.R.S. 24-72-203(4) (2001).

[403] Conn. Gen. Stat. 51-216a (2001).

[404] Conn. Gen. Stat. 51-216a(f) (2001).

[405] 1 Del. C. § 213 (2001).

Florida

Florida has an extremely expansive approach to protecting its governmental works. Indeed, simple description would fail to capture the breadth claimed in the statute:

> The legal title and every right, interest, claim or demand of any kind in and to any patent, trademark or copyright, or application for the same, now owned or held, or as may hereafter be acquired, owned and held by the state, or any of its boards, commissions or agencies, is hereby granted to and vested in the Department of State for the use and benefit of the state; and no person, firm or corporation shall be entitled to use the same without the written consent of said Department of State.[406]

In addition to this encompassing general claim, Florida also claims specific copyright protection in many particular circumstances.

Computer software created by a state agency may be copyrighted and licensed, with fees based on "market considerations" staying within the creating agency.[407] A special provision, though, limits licensing fees for software that is used solely to access public records of the agency (so that the software is not used to circumvent public access regulations).[408]

The Department of Law Enforcement is specifically authorized to copyright its products, particularly including training materials.[409] Proceeds from the sale or licensing of its materials may be used to finance activities of the Department.[410]

Very similar authority is also delegated to the Department of Transportation,[411] Water Management Districts,[412] and state universities.[413] A slight difference is seen regarding state universities, which must direct their proceeds into its "division of sponsored research".[414]

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[406] Fla. Stat. § 286.021 (2001).

[407] Fla. Stat. § 119.084 (2001).

[408] Fla. Stat. § 119.07 (2001).

[409] Fla. Stat. § 943.146 (2001).

[410] Fla. Stat. § 943.146(f)(4) (2001).

[411] Fla. Stat. § 334.049 (2001).

[412] Fla. Stat. § 373.608 (2001).

[413] Fla. Stat. § 240.229 (2001).

[414] Fla. Stat. § 240.241 (2001).

Georgia

Georgia asserts copyright protection in its case law reporters, court rules, and related works.[415]

Georgia also asserts copyright in its state statues (although the authority to claim the copyright is not specifically set out in its statutes).

The state also has a unique provision extending copyright protection to the design of honorific license plates.[416]

Hawaii

Hawaii protects its statutes, directing that royalties for use of the statutes in electronic research formats into a "legislative publications special fund" to improve public access to legislation.[417]

Hawaii authorizes the University of Hawaii to protect works created by its Research Corporation of The University Of Hawaii.[418]

Hawaii delegates authority to copyright government-created computer software to its Hawaii Software Service Center (which is under the state's High Technology Development Corporation.)[419]

Idaho

Idaho asserts copyright in its state code.[420]

Illinois

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[415] O.C.G.A. 50-18-34 (2001).

[416] O.C.G.A. 40-2-86.5 (2001).

[417] HRS § 21D-5 (2001).

[418] HRS § 307-8 (2001).

[419] HRS § 206M-34 (2001).

[420] Idaho Code 73-210 (2002).

Illinois claims copyright protection in the headnotes, syllabi, and materials added to the decisions of its state courts.[421]

The state, though, specifically directs that its statutes "shall be entirely in the public domain for purposes of federal copyright law".[422]

Illinois also gives broad authorization to its state agencies to manage the intellectual property they create. Under the broad umbrella term of "concessions", it allows "assignment, license, sale, or transfer of interests in or rights to discoveries, inventions, patents, or copyrightable works".[423] Public institutions of higher education are granted the same authorization, although under a separate statute.[424]

The state also asserts copyright in the Illinois Scientific Surveys created by its Department of Natural Resources.[425]

Indiana

Indiana delegates copyright authority to its state lottery commission.[426]

The state also has a unique provision extending copyright protection to bookkeeping systems, forms, records, and books created by the state.[427] This is interesting, in that it runs counter to a century-old holding of the United States Supreme Court. In *Baker v. Seldon*, the Court denied copyright protection for bookkeeping forms; the Court found that such a copyright would go too far, protecting the use of the bookkeeping system instead of just one guide or description of the system.[428]

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[421] 705 ILCS 65/5 (2001).

[422] 25 ILCS 135/5.04(a) (2001).

[423] 30 ILCS 500/53-10 (2001).

[424] 30 ILCS 500/53-25 (2001).

[425] 30 ILCS 105/6z-14 (2001).

[426] Burns Ind. Code Ann. 4-30-3-12 (2002).

[427] Burns Ind. Code Ann. 5-11-1-19 (2002).

[428] 101 U.S. 99 (1879).

Iowa

Iowa does not assert copyright in its state code, stating that the cost of providing copies of the code be limited to the expense of reproduction and delivery.[429]

Iowa authorizes copyright protection of state-developed computer software.[430] The authorization is contained in the state's "Examination of Public Records (Open Records)" suite of statutes, and specifically protects access to public records contained within software; the agency bears the cost of separating such public records for free examination.[431]

Kansas

Kansas asserts copyright in its case law reporters[432] and annotated statutes.[433]

Kentucky

Kentucky expressly prohibits copyright in the opinions of its state courts.[434]

The state does claim copyright in its statutes; note, though, that the state electronic legislative database is prohibited from charging users to access the statutes, although the free access is not meant to relinquish its copyright.[435]

Louisiana

Louisiana emphasizes public access to judicial decisions; it charges each level of the judiciary with a specific standard, and covers all employees with a general standard of making access "reasonable, fair, and affordable".[436]

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[429] Iowa Code § 2.42(12) (2002).

[430] Iowa Code § 22.3A(3) (2002).

[431] Iowa Code § 22.3A(2) (2002).

[432] K.S.A. § 20-206 (2001).

[433] K.S.A. § 77-133 (2001).

[434] KRS § 21A.070(4) (2001).

[435] KRS § 7.500(7) (2001).

[436] LA State Supreme Ccourt, General Admin. Rules § 10 (2002).

Louisiana delegates copyright authority to its public institutions of higher education, specifically allowing royalty-sharing contracts with "faculty, research staff, or athletic coaching staff" under its Ethical Standards for Public Employees.[437]

Louisiana also delegates copyright authority to its Louisiana Economic Development and Gaming Corporation[438] and its Louisiana Lottery Corporation.[439]

Maine

Maine has a unique provision specifically prohibiting copyright in (and licensing of) state information accessed through its electronic system, InforME.[440]

Maryland

Maryland claims copyright in the judicial decisions of its state courts as property of the state.[441]

An interesting case -- while nearly a century old -- held that the private publisher contracted to print the state code could not be compelled by mandamus to provide other publishers with copies of the state code at a wholesale price for resale.[442]

Massachusetts

Massachusetts vests a copyright-like power in its state purchasing agent.[443] If the agent determines that a particular work is "not of sufficient public benefit to be distributed free of charge", then it may declare the work an "official text book, case book or technical report".

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[437] La. R.S. 42:1123(9)(a) (2002).

[438] La. R.S. 27:221(3) (2002).

[439] La. R.S. 47:9009(A)(3) (2002).

[440] 1 M.R.S. 538 (2001).

[441] Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. § 13-203 (2001).

[442] Curlander v. King, 112 Md. 518, 77 A. 60 (1910).

[443] Mass. Ann. Laws ch. 5, § 8 (2002).

The state secretary is the exclusive distributor of such works. The works are provided free of charge to members of the Massachusetts government. Others may purchase the works, paying at least the estimated cost (as determined by the comptroller).

Michigan

Michigan claims copyright in its bills and resolutions,[444] legislative register,[445] calendar,[446] house and senate journals,[447] and bill analysis.[448]

For other government works, Michigan has delegated authority to its State Administrative Board to "copyright literary, educational, artistic, or intellectual works in the name of this state and license the production or sale of those works."[449]

And Michigan encourages the development and protection of intellectual property in its institutions of higher education. The University of Michigan organized a Technology Transfer Office to facilitate protecting creations of university faculty and staff through patents, copyrights, and trademarks.[450]

Minnesota

Minnesota does not claim copyright in its statutes.

Minnesota has a unique provision, requiring legal review of contracts involving intellectual property rights.[451] The attorney general reviews contracts of the sale or license of state-developed intellectual property, as well as contracts where the state acquires intellectual property.

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[444] M.C.L.S. § 4.1204b (2001).

[445] M.C.L.S. § 4.1203 (2002).

[446] M.C.L.S. § 4.1204b (2002).

[447] M.C.L.S. § 4.1204f (2002).

[448] M.C.L.S. § 4.1204c (2002).

[449] M.C.L.S. § 17.401g (2002).

[450] *See* http://www.techtransfer.umich.edu/inventors/inventors.html

[451] Minn. Stat. § 16B.483 (2001).

The state also claims copyright in the historical notes, editorial commentary, and other materials added to its statutes.[452] The same claim is made to agency regulations.[453] Revenue is directed to the general fund of the state.

Minnesota also specifically authorizes the sale or license of state-developed computer software.[454] Proceeds are generally directed to a "intertechnology" fund; specific exemptions, though, allow environmental and family-services agencies to retain proceeds from the software they develop.[455]

Minnesota also claims copyright in the results of projects supported by its "Environment And Natural Resources Trust Fund".[456]

Mississippi

Mississippi claims a broad copyright in its code, covering "[a]ll parts of any act passed by the Mississippi Legislature, or of any code published or authorized to be published by the Joint Committee on Compilation, Revision and Publication of Legislation".[457] The claim is broad, in that it reaches not only annotations, indices, and other commentary, but also covers the actual text of the code.

This broad coverage is backed by an extreme "liquidated penalties" provision. Unauthorized use of the copyrighted code is subject to a civil penalty of not less than $1,000 per day per violation[458] (and be subject to an injunction on the use).[459] Civil penalties are directed to the general fund of the state.

Missouri

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[452] Minn. Stat. § 3C.12 (2001).

[453] Minn. Stat. § 14.47 (2001).

[454] Minn. Stat. § 16B.405 (2001).

[455] Minn. Stat. § 16B.405(b) and (c) (2001).

[456] Minn. Stat. § 116P.10 (2001).

[457] Miss. Code Ann. 1-1-9 (2001).

[458] Miss. Code Ann. 1-1-9(3)(a) (2001).

[459] Miss. Code Ann. 1-1-9(3)(b) (2001).

Missouri has delegated copyright authority to its institutions of higher education, which are allowed to develop their own regulations for managing intellectual property flowing from state-funded research.[460]

Missouri authorizes its Department of Mental Health, which may copyright and sell its training manuals and information materials.[461] Proceeds are deposited into the general revenue fund.

Montana

Montana explicitly prohibits copyright in its annotated code -- yet claims the code as "state property".[462]

This interesting change occurred in 1993, when the "may not be copyrighted" language was substituted in the place of "shall be copyrighted for and in behalf of the state of Montana by the secretary of state".[463]

Nebraska

Nebraska asserts copyright in the case law reporters of its courts.[464]

It also claims copyright in its statutes.[465]

Nevada

Nevada asserts a broad copyright in its government works. The superintendent of the state printing office is authorized to "secure copyright under the laws of the United States in all publications issued by the State of Nevada".[466]

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[460] 173.560 R.S.Mo. (2001).

[461] 630.095 R.S.Mo. (2001).

[462] Mont. Code Anno. 1-11-304 (2001).

[463] Amd. Sec. 2, Ch. 100, L. 1993 (effective March 17, 1993).

[464] R.R.S. Neb. § 24-212 (2002).

[465] R.R.S. Neb. § 49-707 (2002).

[466] Nev. Rev. Stat. Ann. 344.070 (2001).

This broad authority, though, must be affirmatively invoked. State publications not registered for copyright are deemed to be given to the public domain.[467]

The broad authority is also supplemented by specific delegation. For example, the state's legislative counsel bureau is authorized to copyright its draft legislation, studies, and other works.[468]

New Hampshire

New Hampshire authorizes its State Reporter to publish and sell judicial opinions and "dispose of the copyright as he shall deem expedient".[469]

New Hampshire also asserts copyright in its statutes -- with the costs of printing and distribution reimbursed to the general fund, and profits given to the State Librarian.[470] In an interesting clause, copies are exchanged with other states on a reciprocal basis: a free trade if the other state's code is given freely, and sold to the other state if it charges for its own code.[471]

New Jersey

New Jersey does not explicitly assert copyright protection in either its case law or statutes.

New Mexico

New Mexico asserts broad copyright coverage through general employer-employee law. Works created within the scope of state employment or with state equipment are considered state property.[472] An exception is made for educational institutions, which may manage works separately.

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[467] Opinions of the Attorney General 3 (1-11-1971).

[468] Nev. Rev. Stat. Ann. 218.698 (2001).

[469] RSA 505:9 (2002).

[470] RSA 20:1(VI)(a) (2002).

[471] RSA 20:1(V)(a)(7) (2002).

[472] N.M. Stat. Ann. 57-3C-3 (2001).

New York

New York claims copyright protection in the statement of facts, headnotes, and other materials added in its case law reporters.[473] The text of each judicial decision, though, are explicitly in the public domain.[474]

North Carolina

North Carolina does not explicitly assert copyright protection in either its case law or statutes. It does, though, direct its Administrative Officer of the Courts to sell copies of state case law reporters "at a price not less than cost nor more than cost plus ten percent".[475]

North Carolina has delegated copyright authority to Agency for Public Telecommunications, which may copyright materials related to its mission.[476]

North Carolina has also delegated copyright authority to its Tryon Palace Commission, which may copyright materials related to its mission of restoring the landmark.[477]

North Dakota

North Dakota invests the Director of its Division of Tourism with broad copyright authority. The director may "obtain copyright or trademark protection for anything that may be used to promote" and is explicitly authorized to "license and charge a fee for photographs and logos and anything with copyright or trademark protection."[478]

Ohio

Ohio asserts copyright in its case law reporters.[479] The contracted publisher is awarded the exclusive right to publish the reporters for the contract term.[480]

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[473] NY CLS Jud 438 (2002).

[474] 1964 Ops Atty Gen July 21.

[475] N.C. Gen. Stat. § 7A-6(b) (2001).

[476] N.C. Gen. Stat. § 143B-426.11 (2001).

[477] N.C. Gen. Stat. § 121-21 (2001).

[478] N.D. Cent. Code 54-34.4-05 (2002).

[479] ORC Ann. 2503.23 (Anderson 2002).

Oklahoma

Oklahoma does not claim copyright in its state code.

Oklahoma recognizes the valuable intellectual property that can arise from state contracts.[481] It charges its Department of Central Services to retain and manage such rights as it does other state property.[482] Proceeds are directed to the state's General Fund,[483] and the Department is authorized to use outside counsel to carry out its duty regarding patents and copyrights.[484]

This broad policy specifically references institutions of higher education. Oklahoma law sets out specific guidelines for its board of regents in developing a model for particular colleges and universities to adapt.[485] The guidelines recognize and encourage the value of state research and development; the guidelines also require an accounting of the expenses and revenues from state-funded research.[486]

Oregon

Oregon charges its Legislative Administration Committee with providing electronic access to all current state laws, bills, and other legislative materials.[487] The LAC is specifically prohibited from charging any fee for the electronic access.[488]

The state, though, also explicitly retains copyright in the materials made available through the electronic system.[489] So, the free and open access through the state electronic system does not work to dedicate the materials to the public domain.

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[480] ORC Ann. 2503.24 (Anderson 2002).

[481] 74 Okl. St. § 85.60 (2002).

[482] 74 Okl. St. § 85.60(B) (2002).

[483] 74 Okl. St. § 85.60(C) (2002).

[484] 74 Okl. St. § 85.60(D) (2002).

[485] 70 Okl. St. § 3206.3 (2002).

[486] 70 Okl. St. § 3206.3(2)(c) (2002).

[487] ORS 173.763 (2001).

[488] ORS 173.763(5) (2001).

[489] ORS 173.763(6) (2001).

Pennsylvania

Pennsylvania has an interesting copyright provision involving its legal publication. The state has charged its Superintendent of Public Printing and Binding to negotiate with a private publisher to purchase "Smull's Legislative Hand Book and Manual of the State of Pennsylvania".[490]

The private publisher's copyright is to be assigned to the state, with the work then edited and distributed by the state.[491]

Pennsylvania has another interesting copyright provision. Its Department of Internal Affairs is tasked with creating a topographic and geologic survey. To accomplish that mission, it is authorized to "avail itself as fully as possible of the information, maps, and surveys, possessed by citizens and corporations of this State". The resulting survey is protected in a bifurcated system: facts are considered public property, while the survey itself is copyrighted by the state.[492] The status is complicated by a recent policy declaring that the surveys are of such important public benefit that they may be freely copied, irregardless of the existing copyright.[493]

Rhode Island

Rhode Island asserts copyright in its case law, with the Reporter assigning the copyright to the Secretary of State "for the use of the state".[494]

South Carolina

South Carolina asserts copyright in its state statutes[495] and regulations.[496]

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[490] 46 P.S. § 92 (2002).

[491] 46 P.S. § 93 (2002).

[492] 71 P.S. § 954 (2002).

[493] 71 P.S. § 954.1 (2002).

[494] R.I. Gen. Laws § 8-1-8 (2001).

[495] S.C. Appellate Court Rules 239(b)(1) (2001).

[496] S.C. Appellate Court Rules 239(b)(3) (2001).

South Carolina also delegates copyright authority to its state Lottery Commission to carry out its mission.[497]

South Dakota

South Dakota claims copyright in its state code. The claim is considerably "hi-tech", authorizing the state code commission to license use of the copyrighted code to computer-based text-retrieval companies.[498]

The state repealed its claim of copyright in case law reporters.[499]

South Dakota also claims copyright in the design of its "state medallion".[500]

Tennessee

Tennessee claims copyright in its case law -- with a unique provision: the contracted printer is awarded the copyright for five years, after which it reverts to the state.[501]

The state also authorizes its Information Systems Council to sell or license state information; each contract must be approved by the speakers of the senate and the house of representatives.[502]

Texas

Texas asserts copyright in its case law.[503]

Texas places great authority in many of its state departments to protect the work of the state. Its Comptroller of Public Accounts provides an example.[504] The authority explicitly includes

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[497] S.C. Code Ann. § 59-150-60 (2001).

[498] S.D. Codified Laws 2-16-8 (2001).

[499] S.D. Codified Laws 16-4-2 (2001) (Prior system of publishing and copyrighting case law repealed by SL 1975, ch 163, 2).

[500] S.D. Codified Laws 1-6-22 (2001).

[501] Tenn. Code Ann. § 8-6-204 (2001).

[502] Tenn. Code Ann. § 4-3-5507 (2001).

[503] Tex. Gov't Code § 22.008(d) (2002).

[504] Tex. Gov't Code § 403.0301 (2002).

securing copyrights,[505] licensing works,[506] waive licensing fees,[507] and award creating employees with an equity share in the copyright.[508] The same powers are given -- in the same language -- to other departments, like the Department of Health,[509] Department of Transportation,[510] and Alternative Fuels Research and Education Commission.[511]

The state also delegates copyright authority to its Texas Department of Economic Development to carry out its mission.[512]

The state directs legislative materials to be available over the internet, but specifically states that such publication is not meant to relinquish its copyright.[513] A similar charge to embrace the internet is given to the state's Department of Housing and Family Affairs, along with the same protection of existing copyrights.[514]

Texas also asserts general copyright protection in the works of state employees, including results flowing from employee suggestions under the State Employee Incentive Program.[515]

Utah

Utah does not explicitly assert copyright in its statutes or case law.

Vermont

Vermont claims copyright in its statutes.[516]

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[505] Tex. Gov't Code § 403.0301(a)(1)(B) (2002).

[506] Tex. Gov't Code § 403.0301(a)(2) (2002).

[507] Tex. Gov't Code § 403.0301(a)(4) (2002).

[508] Tex. Gov't Code § 403.0301(d) (2002).

[509] Tex. Health & Safety Code § 12.020 (2002).

[510] Tex. Transp. Code § 201.205 (2002).

[511] Tex. Nat. Res. Code § 113.243 (2002).

[512] Tex. Gov't Code § 481.021(7) (2002).

[513] Tex. Gov't Code § 323.0145(d)(2) (2002).

[514] Tex. Gov't Code § 2306.077(c) (2002).

[515] Tex. Gov't Code § 2108.036 (2002).

The state also authorizes its Director of Property Taxation to copyright maps made pursuant to its mission.[517] The maps may be inspected free of charge[518] -- but unauthorized reproduction is subject to a fine of up to $1,000.[519]

Virginia

Virginia claims exclusive rights in its state code, including "including statute text, regulation text, catchlines, historical citations, numbers of sections, articles, chapters and titles, frontal analyses and revisor's notes".[520] (The state, though, does recognize the potential copyright of materials added later by third parties.)

Virginia also claims broad property rights in all of the works of its employees -- "potentially patentable or copyrightable".[521] The state's claim is based on traditional employer-employee law, attributing to the employer works created within the scope of employment or with state facilities.

"Public institutions of higher education" are specifically exempted from this broad regulation, with faculty and staff subject to the regulations set out by their college or university.[522]

Washington

Washington does not explicitly assert copyright protection in its statutes or case law.

West Virginia

West Virginia directs its Reporter to secure copyright in the state case law reporters for the benefit of the state.[523]

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[516] 2 V.S.A. § 421(b) (2001).

[517] 32 V.S.A. § 3409(2) (2001).

[518] 32 V.S.A. § 3409(1) (2001).

[519] 32 V.S.A. § 3409(3) (2001).

[520] Va. Code Ann. § 30-147 (2002).

[521] Va. Code Ann. § 2.2-2822 (2002).

[522] *Id.*

The state also delegates copyright authority to its institutions of higher education, which may elect to share proceeds from intellectual property with creating faculty, staff, and students.[524]

West Virginia also directs that maps made under contract are explicitly "works made for hire", with the copyright held by the state.[525]

Wisconsin

Wisconsin does not explicitly assert copyright in its statutes or case law. It does, though, delegate copyright authority to institutions of higher education,[526] as well as school districts.[527]

Wyoming

Wyoming does not explicitly assert copyright protection in its statutes or case law. It does, though, claim "all public records" as "property of the state".[528]

ENDNOTES: Appreciation & Disclaimer

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Disclaimer

The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

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[523] W. Va. Code § 5A-3-23 (2001).

[524] W. Va. Code § 18B-12-4 (2001).

[525] W. Va. Code § 24E-1-7 (2001).

[526] Wis. Stat. § 39.115(1) (2001).

[527] Wis. Stat. § 119.18(18) (2001).

[528] Wyo. Stat. § 9-2-410 (2001).